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WISCONSIN REPORTS
98

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

DECEMBER 10, 1897 — MARCH 22, 1898

FREDERIC K. CONOVER
OFFICIAL REPORTER

CHICAGO
CALLAGHAN AND COMPANY
1898

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
SILAS U. PINNEY,
ALFRED W. NEWMAN,[1]
ROUJET D. MARSHALL,
CHARLES V. BARDEEN.[2]

Attorney General, - WILLIAM H. MYLREA.

Clerk, - - - CLARENCE KELLOGG.

---

[1] Died Jan. 12, 1898. [2] Appointed Jan. 20, 1898.

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MEMORANDUM.

Mr. Justice BARDEEN took no part in the decision of those cases in which the opinions were filed February 8, 1898, they having been argued and submitted before his appointment as justice.

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IN MEMORIAM.

DEATH OF MR. JUSTICE NEWMAN.

ALFRED W. NEWMAN, a justice of this court from the 1st day of January, 1894, died at his home in the city of Madison on the 12th day of January, 1898.

On the 21st day of March, 1898, J. W. Losey, Esquire, addressed the court as follows:

May it please the Court:— At a meeting of the State Bar Association, held in Madison on the 22d of February, 1898, that body appointed J. W. Losey, of La Crosse, J. M. Morrow, of Sparta, and Burr W. Jones, of Madison, a committee to prepare and present to this court a memorial of the late Justice ALFRED W. NEWMAN. That committee has prepared such memorial, and now, on behalf of the State Bar Association, submits it to the court and moves that it be received and order made that it be entered of record.

Memorial of the State Bar Association.

ALFRED W. NEWMAN, an associate justice of the supreme court of Wisconsin, departed this life, at the city of Madison, on the 12th day of January, 1898, his death resulting from accidental injury received the day before.

Justice NEWMAN was born April 5, 1834, at Durham, Greene county, New York. Both on his father's and his mother's side he was of English descent, his ancestors in this country being found among the early Puritan settlers of New England. He was born upon a farm and grew up as a farmer's boy, receiving such education as the neighborhood schools afforded, and subjected at home and at school to the strict discipline and religious instruction and observances required by the Presbyterian church, of which both his parents were devout members.

When thirteen years of age he accompanied his father to Albany and was there present in court when his father was examined as a witness, and it is said that he then determined to become a lawyer, and that thereafter all his efforts to obtain an education had that end in view.

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When about eighteen years of age he entered an academy at Ithaca, and after two terms there he entered the Delaware Literary Institute at Franklin, New York, where he remained for two years. He then entered Hamilton College, at Clinton, New York, joining the class of 1857, with which, in due course, he was graduated, receiving the degree of A. B. While in college he diligently pursued extra law studies under Professor Theodore W. Dwight, and after graduation he continued the study of the law in the office of John Olney, Esq., at Windham Center, in Greene county, until admitted to the bar at the general term of the supreme court at Albany, December 8, 1857.

In January, 1858, he started for the west. Stopping first at Ahnapee, in Kewaunee county, he removed in March, 1858, to Trempealeau, in Trempealeau county, which ever after remained his home until his removal to Madison in 1894.

He held the office of county judge of Trempealeau county from April, 1860, until January, 1867, when he assumed the office of district attorney, to which he had been elected in the fall of 1866. He was re-elected district attorney in 1868, 1872, and 1874, thus holding that position for eight years.

He was twice elected to the state legislature, serving as a member of assembly in 1863, and senator from the thirty-second district in 1868 and 1869.

While he was holding the office of district attorney, the legislature, in 1876, formed a new judicial circuit — the Thirteenth — consisting of the counties of Eau Claire, Buffalo, and Trempealeau. In April of that year Mr. NEWMAN was elected judge of this new circuit, and discharged the duties of that position until, in 1878, as the result of legislative action, he was transferred to and became judge of the Sixth circuit. He was re-elected — without opposition — in 1882 and 1888. The third term for which he was elected expired January 1, 1895.

In the spring of 1893, Hon. WILLIAM PENN LYON, chief justice of the supreme court, having expressed his intention not to be a candidate for re-election, Judge NEWMAN was called out as a non-partisan candidate and elected to the position of associate justice. His services began at the opening of the January term, 1894. He had completed four years of his term, and was about to begin the fifth year with the opening of the January term, 1898, on the day — January 11th — when he met with the accident which terminated his life.

During the period of his general practice of the law, from 1858 to 1876, it did not fall to the lot of Judge NEWMAN to take part in litigation so important by reason of the amounts involved or the standing of the parties as to attract general attention to his abilities; but he became well known in the region to which his practice was confined

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as a well equipped and successful practitioner and a thoroughly sound and reliable professional adviser; and lawyers who were brought into personal contact with him discovered that he was a close student of the philosophy of the law, and well grounded in the fundamentals of legal science.

His studious habits and eagerness for the acquisition of knowledge were not confined to the law. His general reading was extensive but discriminating in every department of literature.

In professional as in private life, his conduct and conversation were irreproachable. On the circuit bench he was kindly and patient in his treatment of the bar, and at the same time firm and tenacious in upholding the rights and discharging the full duty of the court. He was prompt and clear in passing upon questions arising in the course of a trial, and freely exercised his powers as a judge to keep the issues necessary to be decided by the court or jury unobscured by irrelevant or immaterial matters.

Only those who were with him in the consultation room can speak of what he contributed to the solution of the numerous and important questions presented during the four years of his service on the supreme bench; but it is not to be doubted that he displayed in this office the same industry, patience, conscientious research, and enlightened judgment which mark his entire career. The opinions of the court which fell to his lot to write are generally brief, but always set out with force and clearness the very points effectually decided and the grounds of the decision.

The simple statement we have given above of the official positions held by Judge NEWMAN during the forty years of his life in Wisconsin shows the character and influence of the man. In the church, in society, in politics, at the bar, and on the bench he gained the confidence of all who approached him, and in every position and relation he fully justified the confidence reposed in him.

Such confidence came to him because he was pure in his private life; kindly, patient, and charitable to all with whom he had dealings; faithful to every trust; a lover of truth and justice; a learned, wise, and conscientious judge. At every point of his life career in the state of his adoption his example tended to the maintenance of peace and order, religion, morality, and justice.

The State Bar Association recognizes that in the death of Justice NEWMAN the bench has lost an enlightened and upright judge, and the state a most useful and exemplary citizen.

J. W. LOSEY,
J. M. MORROW,
BURR W. JONES.

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In presenting this memorial I am impelled to say a few words for myself concerning the life of Judge NEWMAN, whom I had known well for a period of almost two score years.

For thirty-five years before moving to Madison, Judge NEWMAN lived in the village of Trempealeau, a place of about five hundred people. He never dealt with great events upon which the eyes of the civilized world were turned. He lived a quiet life, in a quiet village. His nature was loyal and capable, as I know, of the strongest disinterested and faithful friendships. He was a gentleman in the true sense of the word; I do not mean in outward polish of manner alone, but in the ever-conscious, instinctive sense of propriety. He always seemed to know the right thing to say and do. His integrity was of the finest character. He was the friend of all movements in behalf of humanity and education, and his humanity was as broad as the sky. On the bench he struck at once for the heart and justice of the case before him. He was fearless, and never swerved from what he believed to be right, and never thought of consequences to himself. In commenting on a case he once said he "believed a lawyer must have an educated conscience to succeed permanently." In a trial his thought steered him through cobwebs and shams and enabled him to go right to the point. I do not believe he was ever conscious of prejudice or resentment toward any one. I practiced before him throughout his judicial career, and I never heard an angry word from his lips; but he ruled his court with a mailed hand and with dignity. In the performance of duty, public clamor never moved him, and "he would not follow the multitude to do evil." As a man he was entirely frank and truthful. He had nothing to conceal, either in his private or public life. He had an amiable disposition, founded on gentleness and goodness of heart. He was modest, and shrank from all notoriety. He was a person of even and unruffled temper. In all social relations his influence was deeply felt. His manners were simple and pleasing. He was gentle but firm; but gentleness is the surest evidence of firmness. His religious life was exemplary, and yet he never obtruded his beliefs. For thirty years he was at the head of a Sunday school in the village where he lived. Old and young dwelt upon his words, and no one can estimate the effect of the lessons in morality inculcated by him in his teaching in this school, nor could those who heard him help being impressed by his earnest, candid, and plain manner of talk, and the principles and lessons inculcated. It is a saying older than the Christian era, "that the life of a nation is in the breath of its children;" and the man who has the patience to voluntarily persistently teach children is doing work for which but few are fitted and in which but few suc-

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ceed. Judge NEWMAN endeavored to obey the injunction: "Fear God and keep his commandments, for this is the whole duty of man."

I thus sum up in a few words my estimate of his character. He was not great in the sense that by any great deed he added lustre to the historic pages of the state of his adoption, but he had great character in the estimation of all who knew him well, and in the performance of every duty which pertained to any trust ever cast upon him by his fellow-men. He led an unsullied life, and had no fear of the end. Less ought not to be said; more than the simple truth, could he know, he would thank no man for saying.

Hon. Burr W. Jones then addressed the court as follows:

Your Honors: — I should hardly have felt like undertaking the duty assigned to me on this occasion had I not known that other gentlemen who knew Judge NEWMAN intimately in his earlier life would also participate. I had no acquaintance with him until a few years after he had entered upon his duties as circuit judge, but I saw and observed enough of his work in that capacity to know that he was born for judicial life. It has never been my privilege to know a man who could preside during the excitement and conflict of a long trial before a jury with more perfect self-command and more perfect control over those about him.

Judge NEWMAN had cast his fortunes in his young manhood in a little village under such circumstances, and had lived in such a way, that his life was closely allied with that of the plain people among whom he lived. He has himself related that when he arrived at Trempealeau in 1857 he had of ready funds only three red postage stamps, but he had a great warm heart full of human sympathy, and a liberal education. He was well trained in a great profession, and loved its traditions and achievements. He had perfect health. He had an integrity and character no man ever questioned; and this young lawyer who had come from the Catskills to the shores of the Mississippi to seek his fortune, with his exuberance of health and his pure ambitions, had already a wealth which only those can appreciate who have begun to look back regretfully upon the hopes and the enthusiasm of distant youth.

With such endowments and such advantages it was natural that the young lawyer should begin to bear not only his own burdens but the loads and cares of those about him. It was natural that those whom he gladly helped should reward him with such honors as were in their gift.

I am told that in his college days he had some reputation as a wit;

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and although he soon became convinced that this was not a distinction to be desired and not a gift which he cared to cultivate, he never lost that keen sense of the ridiculous which lightened the cares of his laborious life.

There is no doubt that his long service as circuit judge was to him a labor of love. On the circuit he thoroughly enjoyed the study of human nature, the sharp contrasts between the tragedy and the comedy of life, where all phases of men's virtues and weaknesses and vices appear in bold relief and in quick succession. He had lived among common people and he knew them thoroughly. He knew how to sympathize with their weaknesses and to love their virtues. In his converse with his intimate friends about the darker pictures of life too often presented before the circuit judge, it was a favorite saying "the world is more weak than wicked." In this warm sympathy with his fellows, in his sturdy sense of justice and his love of the law and its maintenance, we find a partial explanation of the fact that long before his election to the supreme court he became distinguished as a judge. He thoroughly understood the responsibilities of one who presides over what may be justly called the people's court. In some remarks made in this court upon the death of Judge SLOAN he spoke of the circuit court as "perhaps the most important court — so near to the people, so potent for protecting and preserving justice among the people, or of perverting it, according to the character and temperament of the man in whom the power of decision and execution is intrusted."

To this modest man the elevation to the supreme court of his state, like his other honors, came without the asking, and in the only way that official distinction is really worth the having. To this new work he brought a rare equipment. His long experience on the bench had taught him that the refinements and technicalities of the law must not be allowed to impede, but only to aid in, the administration of justice. It goes without saying that a man of his intellect and industry, after such a training, was familiar with the practice, the rules of evidence, and the decisions of his own state; but, however important, these were not his only resources. From his college days he had found his diversions in the paths of literature, in the company of the great thinkers and writers of all the ages. Although never extravagant in statement or thought he was an enthusiast in his love of the law as a science, in his love for that profession which opens so royal a road for noble men, and in his devotion to the great jurists and judges who, following "the gladsome light of jurisprudence," have benefited their fellow-men.

He thus brought to the high duties assigned to him no mere knowledge of the tools and technicalities of the law, but that ripe experience, that wide knowledge of books and human life and law, which enabled

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him as a judge of our highest court to share with his associates in the honor of upbuilding the jurisprudence of the state. He no doubt realized, as every distinguished judge of a court of last resort must realize, that his work and his memory will remain as the help and the inheritance of other generations long after the work of less favored public servants is forgotten. Whatever may be the toil, whatever the sacrifice, this is the abundant reward of able and devoted judicial service.

Though it seldom happens that the ambitions of young manhood are realized, we may well doubt whether the young lawyer, as he first looked upon the hills of Trempealeau, dared to hope for greater happiness and greater honors than those which were in store for him. In due time there came to him that blessing compared with which other pleasures are trivial indeed, the peace and the delight of a loving family and a happy home, where for more than thirty-seven years, in the sweet companionship of those he loved, glided "the smooth current of domestic joy." During all these years he was foremost in every good work and enterprise and charity of the community in which he lived, and during all his mature life he was a trusted leader in his church. As we all know, he bore his part in framing the legislation of his state. With such a life and with his temperament, it must have filled the full measure of his laudable ambition to be known and honored as a just judge in the supreme court of the state he loved so well. No one knew better than he that there is no duty so godlike as the administration of justice among men, and it is no extravagance to say that he gave the best efforts of his life that the courts of law might become

"A shrine of refuge from life's stormy throng."

Hon. J. M. Morrow then spoke as follows:

It is always with feelings of sadness that we render homage to the memory of those we mourn. Tributes to the memory of the dead should be such as we could have truthfully uttered of them while living. To say kind words of the late Justice NEWMAN is a pleasant, easy task. I had but slight or general acquaintance with Judge NEWMAN prior to his becoming judge of the Sixth circuit in 1877. From that time on, during the sixteen years he held that position, I knew him well; from frequent trials and proceedings in his courts, and from the social conditions arising from attendance in the various counties of his circuit; stopping at the same hotels; eating at the same table. The result of this association was to arouse in me an increased and increasing respect for him both as judge and man.

His integrity was beyond question. His love for truth, for the very

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right, was a marked characteristic. He was pure-minded. It seemed to me that he often sustained or felt a moral shock at the crimes, or the perpetrators, coming to his notice as judge, though in criminal trials he was eminently fair. His manner on the bench was pleasant. He was kind and helpful to the young practitioner. He was courteous, considerate, and patient with all. He could not approve of anything savoring of sharp or tricky practice. If he thought such a condition existed, he had a quiet, positive way of repressing it and its projector that made the occasion one easily to be remembered.

He was a plain man, plain in dress, manner, and speech. He was unassuming, honest, and humble. He had neither love nor use for pomp or ostentatious display. He was one of the people. It is one of the pleasant noticeable facts of his life that he was very near to the people. In the counties of his old circuit he was looked up to, respected, and admired by all. His coming at term times was looked forward to by those of his acquaintance as a time of pleasure to them, and doubtless was so to him.

The old farmer who felt at liberty to shake hands with the judge took away with him something of self-pride, such as always comes from contact with those one looks up to. Not long ago, when the story of Justice NEWMAN'S illness went abroad, and later, when his sudden death was announced, there were no truer sympathizers, no more honest mourners than these plain, common people to whom he was endeared by his kindly manner and manly performance of his judicial duties. When his name was proposed for promotion from the circuit to the supreme bench, I believe there was not one of all these but approved, and felt a personal pride in the fact of a deserved promotion. This high, strong position he held in the esteem of these plain, common people is one of the brightest jewels of his crown.

His exterior, while pleasant, was not so polished and smooth as some, yet within one found a sound, warm heart beating in full sympathy and unison with the requirements of humanity.

He esteemed others, not according to outside show, but as he gauged their real worth. He did nothing for mere appearance or effect. He had no wish to be valued for qualities he did not possess. He never acted a part. He was a just judge. His intrinsic worth was what we loved him for. He convinced every one of his honesty of purpose, by his candor, kindness, modesty, force, and clear reasoning. The positions he filled were well filled; their every requirement being fully met. What more need be said of ALFRED W. NEWMAN, with his proud record of judge, citizen, husband, father, man.

May our lives be as pure and free from stain or tarnish. May we leave behind us, as he has done, a good name. Then when we are

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called, the world will miss us, notwithstanding its busy tread. For surely, those who do their duty as their ability permits must have their place in the economy of the world.

Mr. Morrow also presented the following

Memorial of the Monroe County Bar.

The members of the bar of Monroe county, mourning with their brethren throughout the state the death of the Honorable ALFRED W. NEWMAN, late justice of the supreme court of the state of Wisconsin, desiring to perpetuate in formal records those sentiments which shall endure in their hearts so long as memory shall endure, adopt this memorial of tender regard and high esteem for the memory of him whom they knew not only as judge and justice, but as counselor, neighbor, and friend.

These are homely truths — that the old friends are the dearest friends; that the rugged scene of early endeavor, though forsaken for the temple of success, remains at last the spot to memory dearest.

Peculiarly fitting then it is that, with the warmth of early friendship, as well as with glow of pride, the bar of Monroe county, over which Judge NEWMAN presided for sixteen years as judge of the Sixth judicial circuit, pay tribute to the life of him whose sterling qualities of character, whose rich attainments of mind, whose high legal and judicial abilities here in part were developed, here in part first met that recognition later accorded by the commonwealth of whose highest judicial tribunal he was, at the hour of his lamented death, an honored member.

RESOLVED: That in the passing of ALFRED W. NEWMAN the state has lost an honored official; the bench and bar a learned and just judge; the people a firm friend; Christianity a witness; humanity a man.

RESOLVED: That application on behalf of this bar be made to the circuit court for Monroe county, now in session, for an adjournment of the said court over Monday, March 21, A. D. 1898, as a mark of respect and esteem for the memory of the departed judge.

RESOLVED: That this memorial be presented to the circuit court for Monroe county, and to the supreme court of the state of Wisconsin upon the day set apart for the formal announcement of the death of the late Justice NEWMAN to that court, with the request to each court that the said memorial may be spread upon the records thereof.

RESOLVED: That a copy of this memorial be forthwith transmitted to the widow and family of the late Justice NEWMAN.

Dated at Sparta, Wisconsin, March 19, 1898.

C. F. MCCLURE, Secretary. J. M. MORROW, Chairman.

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Death of Mr. Justice Newman.

Chief Justice CASSODAY responded, on behalf of the court, as follows:

After having faithfully served as a member of this court for four years, and while on his way to the capitol to commence the labors of another year, our late Brother NEWMAN became the victim of a cruel accident which might have happened to the young and strong as well as to the aged and infirm — and twenty-six hours afterwards he breathed his last. The shock came to his beloved family, the members of this court, and the people of the state at large as an appalling tragedy. Two years ago he had the misfortune of having a partial stroke of paralysis which disabled him for some months and left him with his speech somewhat impaired, but otherwise in nearly his normal condition. His efforts by exercise and treatment to regain what he had thus lost were heroic and constant. The night before the fatal accident he took his long and favorite walk of nearly four miles, and while doing so congratulated himself upon the improvement in his speech and movements and upon the fact that from the opening of court the first of September he had, on each assignment, been able to complete his opinions on time — an achievement which most of us had failed to accomplish. But his cherished hope of complete recovery was suddenly blasted by one misstep while in the exercise of special care.

During his forty years residence in this state his life had been an open book; nearly thirty-two years of that time were spent in public office — county judge, district attorney, member of assembly, state senator, besides more than seventeen years as circuit judge. His great popularity may readily be accounted for by those who knew him best. He was always modest, faithful, diligent, and efficient in the performance of duty to the very best of his ability. Possessed of courage, moral and physical, equal to any undertaking, he nevertheless was naturally very diffident, shrinking from all controversy, rarely aggressive, never offensive. It may be safely assumed that he never actively sought office and seldom, if ever, refused office. He had a kind heart, a generous spirit, and a broad Christian charity. In his Trempealeau home he was, for many years, the center of a large circle of friends who were enriched by his counsel and guided by his judgment. He had a remarkable memory; and on his long walks about the city, as conversation turned from one topic to another, he would illustrate the subject by apt quotations from Homer, Horace, and Virgil, as well as English and American poets. It was certainly fitting that Hamilton College — his beloved Alma Mater — should, in the last year of his life, crown him with the high honor of LL.D.

A good man with a life full of good works and an abiding Christian faith has passed away. He was the sixth member of this court who

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has died in the harness — three of them in succession suddenly and without warning. But the ranks are again closed and the court moves on in duty. Thus, it happens that in the midst of life we find death; and yet, through the tender mercies of our Heavenly Father, death may be the door which enables the righteous to pass into a more active and nobler existence.

The expressions of esteem which come from the bar are fully indorsed by the court.

DEATH OF HON. JAMES R. DOOLITTLE.

Judge ELBERT O. HAND presented the following

Memorial of the State Bar Association.

In compliance with the appointment by his Honor the Chief Justice, as president of the State Bar Association, of us a committee to make such presentation to the supreme court upon the services and death of Hon. JAMES R. DOOLITTLE as they may be advised, we beg leave to present to the court the following memorial:

JAMES ROOD DOOLITTLE was born January 3, 1815, on a farm in the town of Hampton, Washington county, New York. He graduated from Geneva, now Hobart, College, New York, in 1834. Choosing the law for a profession, he was admitted to the bar in 1837 and commenced practice at Warsaw, county seat of Wyoming county, New York, in 1841, where for a time he was district attorney. In 1851 he removed to Racine, Wisconsin, and the following year was elected circuit judge for the First judicial circuit of Wisconsin. In 1856 he resigned that office, and in 1857 was chosen United States Senator by the republican legislature of Wisconsin, to which position he was re-elected in 1863, remaining in the Senate until his term expired in 1869. At the close of his senatorial career he resumed the practice of law, and continued it at Racine and Chicago until his death.

He was a member of the First Baptist Church at Racine, Wisconsin, for over forty years.

At the home of a married daughter in Rhode Island, on July 23, 1897, after having reached the age of eighty-two years and having been a resident of Racine, Wisconsin, nearly half a century, Hon. JAMES R. DOOLITTLE died full of years and honors, a long life's work well done, bearing to his Maker the fruits of the faithful and earnest usage of the talents entrusted to him.

In the most eventful period of our nation's history, he acted an important and conspicuous part. He was the confidential friend and adviser of Abraham Lincoln. His patriotism was earnest, and all his

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powers were enlisted in support of the government, the suppression of the Rebellion, and the re-establishment of complete and perfect union.

Of commanding presence, with an impressive manner and powerful voice, combined with a rare power of holding the attention and reaching the understanding of both the educated and the ignorant, he was almost unrivaled as an orator, and crowds of people gathered at every opportunity to listen spell-bound to his forceful eloquence, and for more than forty years he has been a potent influence in forming and guiding public opinion.

As a statesman, he stood peer among those great men who guided our nation through the dark years of its greatest crisis, headed though they were by the immortal Lincoln.

As a practitioner at the bar, he was ever courteous and kindly to his brethren of the profession, loyal to his clients, and persuasive and convincing in his arguments. As a judge, he was upright, fearless, and impartial.

As a citizen, he had the respect and confidence of all who knew him, and most of those who knew him best; and throughout his career as a public man, amidst the greatest opportunities and temptations to make private gain of his public place, he lived unsmirched, and laid down those positions and those opportunities a poorer man than when he assumed them.

His family life was ideal, and presented in its most perfect form that best of the institutions of modern civilization, the home, with the wise and loving father at its head.

He was a consistent and devoted Christian, and illustrated in his life a profound faith that God reigns and rules the world.

It is therefore

RESOLVED: That the bar of Wisconsin record this testimonial of their appreciation that the life and services of their honored member, JAMES ROOD DOOLITTLE, have been devoted to the welfare of his country and mankind, and that in his death the state has lost one of its most distinguished and faithful citizens, the profession one of its most powerful and honest advocates, and his family a loving and devoted father.

ELBERT O. HAND,
J. V. QUARLES,
JOSHUA ERIC DODGE.

Judge HAND then addressed the court as follows:

During the past year one of the illustrious men of the state and nation, Ex-Senator DOOLITTLE, has departed this life and gone to his eternal rest.

No impartial history of our republic for the past fifty years could be written without assigning DOOLITTLE a conspicuous place. When our

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Death of Hon. James R. Doolittle.

country was passing through its critical, crucial period DOOLITTLE was an active power in moulding public opinion and guiding the ship of state.

To the state of Wisconsin his life has been an open book.

His chief characteristic was love of his home, his country, and his God. In his home he was all that could be desired. Kind, gentle, loving, and forbearing, he bound his family to him by hooks of steel. He was blessed in the companionship of a wife of uncommonly good judgment and intelligence, whom he consulted fully in all cases, and with whom he worked harmoniously and lovingly.

In social life his bearing was so considerate, so free from ostentation, and so kindly sympathetic that he captured the hearts of all and was gladly welcomed in every social circle. The humblest citizen never felt abashed in his presence, and a kindly greeting, listening ear, and attentive consideration were extended to all. His hospitality was proverbial, and every guest was made to feel welcome in his delightful home. His manners were those of the old school, affable, courteous, dignified, and considerate of the opinions of others.

For his country DOOLITTLE was ever ready to make any sacrifice and to exert his utmost powers. As a public speaker during the Civil War he exerted a powerful influence in support of the Union and against the Rebellion. No voice was more potent than his in moulding the policy of the administration during the life of Abraham Lincoln. Perhaps no man in public life at Washington was more trusted by the martyred president. At one time President Lincoln was severely criticised by the press and many public men, and DOOLITTLE was asked his opinion. Raising himself to his full height, and in stentorian tones, he replied "I believe in God and Abraham Lincoln." The words rang through the country from one end to the other like a bugle blast, and did much to silence the opposition to the president.

It would not be proper at this time to enter into a lengthy discussion of the propriety of Ex-Senator DOOLITTLE'S course after the assassination of President Lincoln with reference to the reconstruction of the seceded states or the impeachment of President Johnson. It can be safely said, however, as time and reflection have cooled the passions of men, that the measures advocated by DOOLITTLE of leniency and forbearance towards the conquered South have commended themselves more and more to the good judgment of the American people. To-day, when we know no North, no South, no East, and no West, and one flag floats over every part of our broad domain, liberty, equality, and fraternity are the watchwords of the nation and sweet charity such as DOOLITTLE recommended is the predominant sentiment. Whatever errors DOOLITTLE committed, if he committed any, at that trying period, were because of the goodness of his heart and his desire that in

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dealing with the Southern people "justice should be tempered with mercy."

Upon all moral questions his position was never doubtful; he was quick to discern the right and ever ready to advocate it. A man of strong convictions, he was ever ready and willing to give a reason for the faith that was in him. His method of reasoning was clear and perspicuous. No one that heard him had the least doubt as to what he meant. His honesty and integrity were unquestioned. Living in an age when money-getting seems to be the one great object of life, and being in public life a long time and at a period when speculation was rife and colossal fortunes were made by public men, he lived and died a poor man. If the line of Pope is true, that "An honest man is the noblest work of God," then it may be justly claimed for DOOLITTLE that he was one of the best of his Master's handiwork.

In personal appearance he was very striking and would attract notice in whatever circle of people he might enter; in figure he was tall, straight, broad-shouldered, powerfully built, crowned by a leonine head and massive brow, with a countenance expressive of kindness, thoughtfulness, and power. It is not strange that he was the favorite tribune of the people.

In his intercourse with his fellow-citizens, the kindness of his heart and the friendliness of his nature found their best expression. Among his fellow-townsmen all were his friends, and any boy or girl that walked the streets never hesitated to ask of him a question or apply to him for assistance in any emergency. It was a pleasure to meet him in social converse, so broad and catholic in his grasp of subjects, so charitable in his judgments, and so tolerant of the opinions of others.

He exhibited the characteristics of the true Christian gentleman in every word and action. He had a strong religious character. During his long residence at the city of Racine he was an active member of the First Baptist Church, and was always found at the post of duty, and his example before the world illustrated his firm belief in the teachings and principles of the Christian religion. Free from cant, hypocrisy, and sectarianism, he was ready to acknowledge Christian character and grant fellowship to a Christian, whether found in his own or some other fold.

DOOLITTLE'S talents were most brilliantly displayed when on the rostrum addressing a popular audience. His voice was so strong and penetrating that he was distinctly heard by the largest assemblage. His style of reasoning was so simple, clear, forcible, and direct as to be adapted to the commonest understanding. He was never guilty of talking over the heads of his audience. This was one of the great secrets of his power as a public speaker. In the southern part of the state one often hears elderly persons speak of the wonderful power of

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Death of Hon. James R. Doolittle.

the addresses of DOOLITTLE when in his prime. While some orators may have been more magnetic, few were more pleasing and convincing. His great abilities were needed and used at the critical period of our nation's history, and he stood a bulwark against secession and slavery and in favor of liberty and union, and his name will be enrolled among the list of illustrious men who saved this great republic. Eloquently and fervently did his words of warning and encouragement ring through the land at a time when the bravest hearts quailed at the thought of the issues of life or death of the nation.

As a lawyer he had charge of many important law cases during his long practice, and while not as distinguished as a practitioner at the bar as some of the leading lawyers of the state, was reasonably successful and always retained the confidence of his clients and tried his cases with ability. But very few of the lawyers are now living who practiced in his court while he was judge of the First judicial circuit, but his reputation as a judge is of the best, and he possessed in an eminent degree the respect and confidence of the bar.

As a statesman he stood high among the first in the land. His acquaintance with public men was very extensive, and his opinion with reference to public measures was often sought and had great weight in the deliberations of the leading men at Washington. Ex-Senator DOOLITTLE lived beyond the allotted age of man, and until a short time before his death he walked the streets with a vigor frequently found wanting in men much younger in years. In reviewing his life the thought presses upon us of how few are now living who were prominently engaged in settling the fate of the country at its great crisis. One by one they join the silent majority in the churchyard, and naught but the remembrance of a grateful people remains. Wisconsin may well feel proud that so many of her illustrious sons were found equal to the occasion.

But it is a great privilege to have been an actor in life's drama at such a time and amid such scenes. Man's life is not to be measured by the years which he has lived, but by the good deeds which he has done and the great events in which he has been a prominent participant. The latter half of the nineteenth century has been crowded with important events, and the world's progress has been wonderful. Well has it been for this land of ours that during the bloody strife and terrible conflict through which we have passed such men as Abraham Lincoln, JAMES R. DOOLITTLE, and a host of others were at the helm to guide the ship of state. Men of patriotism and broad statesmanship were then wanted, and from all over the country such men appeared to supply the need. Such patriotism, such statesmanship are needed to-day. We have plenty of wealth and are making rapid material progress, but the need of patriotic, unselfish, broad-minded men like DOOLITTLE is as great as ever.

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Death of Hon. James R. Doolittle.

Mr. Justice WINSLOW, on behalf of the court, responded as follows:

With the death of JAMES R. DOOLITTLE, there passed from the stage a remarkable figure and one of which Wisconsin may well feel proud.

Born in the early years of the century, he almost reached its close with his mental powers unimpaired and a sturdy frame which showed but slightly the signs of his advancing age.

Nor was his life one of quietness and ease; it was full to the brim of care, of labor, and of events. Early in life there came to him great and deserved political triumphs, which brought with them equally great cares and responsibilities. He met these cares and responsibilities with a fortitude born of lofty resolve and an unfailing devotion to his duty as a man and a citizen. There came to him later bitter disappointments and crushing sorrow, and he met these with the same fortitude and the same lofty resolve.

Fate placed him in the forefront of events at a momentous crisis in the national history, when the destiny of the republic was trembling in the balance and the future seemed dark and doubtful. The test was supreme, but it was fully and bravely met. Standing by the side of the great Lincoln as one of his trusty and trusted counselors, he rose to the full stature of a statesman, able to cope with the greatest questions and fit to properly represent this great commonwealth. His services to the state and nation and to the cause of free government during the twelve years which he spent in the Senate cannot be easily over-estimated. He left that high office poor in purse but rich in the consciousness of having patriotically performed his duty and of having bravely borne no small share in the great battle to preserve human liberty and free institutions.

He was without question a lawyer of great learning and breadth of mind; but the imperious call to the greater duties of a national legislator took him from the bar for so long a period during the very prime of life that his career as a lawyer was never rounded out to the full, and hence it is that he will be remembered for his achievements as a statesman rather than on account of his greatness as a lawyer.

It was my good fortune to know him personally from my boyhood, and I can speak from a personal and intimate acquaintance of his character as a friend and neighbor and a private citizen. He was a Christian gentleman, with all which that name implies, and when I have said this I have said, perhaps, all that is necessary. He carried into private life and daily walk the same virtues, the same manly fortitude, and the same resolve to do his duty as he understood it, that he exhibited in public station.

JAMES R. DOOLITTLE was a good man, as well as a great man; he honored his state, and his state does well to honor him.

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DEATH OF HON. JOSEPH T. MILLS.

A. R. Bushnell, Esquire, addressed the court as follows:

May it please the Court:—By direction of a meeting of the bar of the Fifth circuit held at Lancaster on the 15th ultimo, at the beginning of the February term, 1898, of the circuit court for Grant county, Judge John G. Clark, Thomas L. Cleary, and myself were appointed a committee to announce to this court the death of our brother the Hon. JOSEPH T. MILLS.

We were also directed by that meeting to present to this court the memorial adopted by them upon that sad occasion, and ask that it be spread of record here.

In the absence of Col. Clark, who informs me that he is unavoidably detained at home, and whose acquaintance with Judge MILLS long antedated my own, perhaps I ought to make reference to some things which he said of our deceased brother, at that bar meeting, much more fully and better than I can say them.

Judge MILLS was at the time of his death, I think, the oldest surviving lawyer of this bar. His practice at the bar of this court, which is but a continuation of the territorial supreme court, began at the July term, 1845. The marks of his legal acumen may be distinctly traced from the 1st of Pinney down through eighty-nine volumes of Wisconsin Reports, covering almost half a century of time; and the impress of his mind upon the statutes of Wisconsin is as plainly marked for a nearly equal period. While in our state legislature he introduced and procured Wisconsin to be the first state outside of New York to adopt the New York Code of Procedure, now substantially in such general use in this and other English-speaking countries. The laws for the practical relief of the railroad farm mortgagors were largely the offspring of his mind. Among the other laws of Wisconsin enacted by bills introduced or written by him may be instanced those allowing damages in case of wrongfully caused death, the making parties to suits competent witnesses in their own behalf, and the limiting of damages for injuries caused by the insufficiency of highways.

He was largely connected with the Sherman M. Booth *habeas corpus* cases in the supreme court of this state and of the United States, arising out of the rescue of Joshua Glover, an escaped slave, under the fugitive slave law of 1850, in which the United States Supreme Court for the first time decided the state-rights question adversely to his then contention, but establishing the national doctrine upon which was afterwards fought out and won the war of the great rebellion, under the administration of Abraham Lincoln. He was a large contributor to the columns of the Grant County Herald when J. C. Cover was its editor; and

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aided much in making that paper the political power that it was in those days.

Judge MILLS possessed a mind of great subtlety, and had little personal ambition. He was a zealous advocate of the inherent rights of man, and his chief ambition seemed to be to aid in the achievement of their final triumph. To secure that end, he wrought in many ways that did not bring himself into personal prominence, but which were nevertheless vastly effective.

He was a firm believer in *vox populi vox Dei;* and he acted up to this belief. Not that he believed that an excited public sentiment was always right, but that, in some way and at some time, sober public opinion would reach the right.

My acquaintance with Judge MILLS began in 1855. He was then in the full tide of legal practice, and I was a young student. His peculiarities were striking, but beneath them all there was that genial and kind humanity that made him many friends. He assumed little dignity, and despised pomposity; but there was an earnestness of purpose and manner about him, and a consciousness of knowledge, that made him strong before a jury who knew the man.

My intimate acquaintance with him began after he was elected judge of the Fifth circuit, when he asked me to come to Lancaster and assist him in closing up his legal business to assume the bench. From that time on I knew him perhaps as well as any one outside of his own family. I practiced before him twelve years when he was on the bench.

He did not possess great executive ability, but in the office and before the court and on the bench he was a great worker, and aside from the lapses into which his strong sense of humor and activity of mind sometimes impelled him, and which after all were perhaps more of necessary relaxation and stimulating spice than anything else, he was always driving at the main point; and with all his eccentricities, for he was eccentric, he never failed to command the respect of every one, and full confidence in his incorruptible honor and integrity.

The tribute of respect to the memory of Judge MILLS, reported by the committee, and adopted by the bar meeting of the Fifth judicial circuit at the last February term of the circuit court for Grant county, is as follows:

Memorial of the Bar of the Fifth Judicial Circuit.

Since the last general term of this court our learned and distinguished brother, Judge JOSEPH T. MILLS, has passed over the river and within that dark shadow which swallows up all things human. He died full of years, aged eighty-six, while on a visit at the home of his son, J. Warner Mills, in Denver, Colorado. After the death of his last wife in 1893, here in Lancaster, where he lived so many years, his home

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Death of Hon. Joseph T. Mills.

was broken up, and he passed much of his time with his children, Eva, Mrs. Judge Anderson, in Manitowoc, Warner in Denver, and sometimes with relatives in Illinois. But his heart was ever here in Lancaster, and, pursuant to his request, here he was buried by his brethren of this bar and his old friends and neighbors.

The death of a brother so eminent in the profession, who has had so much to do with shaping the laws of our state, who has held such honorable positions among us, and with whom we have been so long and so pleasantly associated, is entitled to more than a passing notice.

Judge MILLS came to Lancaster soon after 1840. He was born on Cane Ridge, near Paris, in Bourbon county, Kentucky, on December 18, 1811. He was one of the younger in a family of several children. His father was a judge of one of the lower courts of that state. In early life he lived and studied with his uncle, Benjamin Mills, one of the judges of the court of appeals of Kentucky. In 1831 he came to Illinois, and soon after entered Illinois College at Jacksonville. He was one of the "Suckers" who came up the river from Illinois to the lead mines of Wisconsin in the spring of 1833, and he returned the same year to Jacksonville. About 1834 or 1835 he came to Fort Crawford at Prairie du Chien, then one of the military outposts of this country, as tutor to the children of Col. Zachary Taylor, who was then commandant of that post, afterwards the "rough and ready" general of the Mexican war, and a little later president of the United States. There, and in that vicinity, he continued to live until he came to Lancaster. While at Prairie du Chien and here in Lancaster he continued his legal studies begun with his uncle Benjamin in Kentucky, and was admitted to the bar of the territorial district court held at Lancaster, on March 27, 1844, on the motion of Thomas P. Burnett, he and Ben. C. Eastman and Nelson Dewey being the committee who examined him, and CHARLES DUNN, chief justice of the territorial supreme court, judge presiding. He taught school for several terms in the northwest of Grant county and here in Lancaster. Here he began the practice of his chosen profession, which left him no time for anything else; and he continued in the profession, with Lancaster as his home, throughout all the rest of his long life.

The life, character, and services of Judge MILLS are to be viewed in connection with the times, and the country, and the part of the country, in which he lived. He was born on the frontier, and always lived along the frontier of the westward march of civilization in the great republic. His birth place was in Kentucky, in 1811, then but little removed from the times when it was known as "the dark and bloody ground" of the Indian wars of its early settlement. He was born and reared in the atmosphere of the Indian fighter, where no man could be

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respected who was not quick and ready to courageously resent an insult, even unto death. He had early imbibed a hatred for slavery, from seeing its workings in that border slave state, where he always insisted the anti-slavery movement had its origin, and from whence came its earlier and most radical supporters. He was a student at Illinois College when Edward Beecher, a brother of Henry Ward Beecher, was its president, and whose early death he greatly deplored, often declaring that he was a bigger and a better man than his brother, the great Plymouth Church preacher. Doubtless the influence of Edward Beecher did not tend to make the young student any the less an abolitionist.

Here in southwestern Wisconsin, the leading mining region, then the most populous and important part of the territory of Wisconsin, among such contemporaries as Thomas P. Burnett of Patch Grove; Barber and Dewey of Lancaster; Cole and Biddlecome and Wm. Hull of Potosi; Ben. C. Eastman, Geo. W. Lakin, and Stephen O. Paine of Platteville; Charles and Frank Dunn, Montgomery M. Cothren, Moses M. Strong, Samuel Crawford, and Mortimer M. Jackson of Mineral Point; James J. Knowlton of Shullsburg; and Wyram Knowlton of Prairie du Chien, young MILLS soon gained a high reputation and practice in his profession as a learned and acute lawyer, and in politics as a radical abolitionist.

His law practice extended to the highest courts, and often his case lost in the lower court was won on a legal point saved for review.

Abolitionists were not popular here in Wisconsin in those days, any more than they were in Boston. There was no political preferment for MILLS until the anti-slavery sentiment of the country crystallized in the formation of the Republican party. He became prominent in the organization of that party, and through it several times was made district attorney of Grant county, was often sent to the state legislature, and was twice elected judge of this judicial circuit, serving twelve years on this bench.

Judge MILLS was a learned and able lawyer, and an upright judge. No suspicion of corruption ever attached to his decisions or any of his actions public or private. He was essentially a student all his long life; and not of the law merely, but of the classics, and the higher mathematics, and of the leading modern languages. Seldom was he found indoors without some book in his hands; and on all subjects he was an original thinker. He was often called eccentric. In his pleas in court he sometimes seemed to ramble, but the opponent who counted on his omitting an essential point in his case reckoned without his host. And his apparent vagaries were often found to parry or cover a vital thrust.

He was a man of extremely temperate and abstemious habits. He did not live to eat and drink, but always ate and drank to live. Thus

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Death of Hon. Joseph T. Mills.

he avoided the excess and temptations before which so many of his contemporaries at the bar of this circuit fell; and he survived them all, except Judge COLE.

He cared little for dress or money. Such a thing as a silk hat or a broadcloth suit never adorned his person. They would have been entirely out of place with all thought of Judge MILLS. Comfort and convenience in clothing were the chief requisites with him. The attractions of wealth had no power over him. The winning of his case in court was of infinitely more importance than the pay it might bring him. His wants were few and easily supplied. Good books were his chief delight, and in all sorts of lore he reveled.

His old pastor, Dr. Samuel W. Eaton, who for over forty years ministered to the Congregational church in Lancaster, well summed up his characteristics, in the so appropriate funeral sermon which he preached over his remains. Of Judge MILLS he said:

"He was a man of extraordinary keenness and originality of intellect. Intercourse with him was refreshing and stimulating. He was continually starting new lines of thought that charmed or electrified the listener by their originality and vigor. His was not a mind to follow beaten paths, but rather to blaze new routes of investigation.

"He was highly educated. Though only in the first-year class in the college, he had a more profound knowledge of languages and mathematics than nine tenths of the graduates. He read and wrote Greek, Latin, French, and Spanish as readily as he did English. After coming to Lancaster he learned German. Mrs. Cox, mother-in-law of Dr. Hassel, was his German teacher. He was a great mathematician, always buying the new works on the higher mathematics, and studying them through, on the subjects of calculus, analytical geometry, and trigonometry. Whenever he went off to court, his books were always put into his traveling bag. His Testament was printed in Greek and Latin in parallel columns. Besides his Testament, he always carried some work he was reading in one of the many languages he knew, and some mathematical books, with his noted up law books. These he carried with him as he traveled round the circuit. One of his latest labors was to commit to memory the whole Bible in German.

"He was a deeply religious man. He may be said to be the founder of the Congregational church in this city; for through his devotion and perseverance the church was largely sustained in its earlier years. His controversies with Jared Warner of Patch Grove, locally noted as a powerful opponent of the Christian church, are famous in the country's traditions for their brilliancy and wealth of knowledge. The two men were fast friends; and it was for his opponent in argument that MILLS named his son J. Warner. One of his favorite arguments was that no

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Jew, no man of Christ's time, situated as he was, could write such a story as the story of Christ's life and teachings; and that Christ's life and teachings are, in themselves, indisputable evidence of his divine origin.

"He was of an exceedingly sunny disposition, jovial, light-hearted, and a good story-teller. He has been likened to Abraham Lincoln in this respect, who was his personal friend. They were both born in Kentucky, both came to Illinois in early life, both had a keen sense of the humorous, and they had much in common between them. He also had great self-control. Probably no man ever heard MILLS raise his voice in anger, though sarcasm and keen retort were his to use if occasion demanded. He was a man of large charity, never speaking ill of his neighbor, and always ready to do a good turn for any one when in his power.

"MILLS was a fighter. It mattered not whether the contest were intellectual or physical, the man who threw down the gage of battle to JOE MILLS must fight. He was an expert in the use of fire-arms. Perhaps no man in the state excelled him with a shot-gun. One of the early sheriffs of Grant county, named Baker, had proofs of his marksmanship. His moral courage was even greater than his physical courage. He was a pronounced abolitionist, at a time when less brave men were cowed into silence by the scorn and contumely heaped upon the early abolitionists. His house was once attacked by a mob of angry and perhaps half-drunken men, who demanded the person of an abolition lecturer named Matthews, who was in the house at the time. Dire threats of tar and feathers and other violence were made against the lecturer. MILLS faced the crowd with his shotgun, drove them away, and took possession of the small cannon they brought with them.

"Judge MILLS was a thoroughly honest and conscientious man. A client with a fat purse was no temptation to him unless he was first convinced that his client was right; then nothing could swerve him."

The consideration of Judge MILLS as a lawyer would be incomplete without notice of his kindness and condescension to the younger members of the bar. No young attorney ever applied to him for aid without obtaining from him ready and cheerful assistance. He gave to them freely from the rich stores of his legal knowledge, just what they needed, without thought of pay or charge. We who were young lawyers when he was one of the leaders of this bar owe much to Judge MILLS for his kindly aid and assistance at times when we needed it most.

It is not to be said that Judge MILLS was entirely free from those frailties which do make us all human. No man is, or ever was, perfect, save He who spoke as never man spake. But we who knew him

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Death of Hon. Joseph T. Mills.

best may truthfully say that throughout his long life we believe he harbored malice toward no one, and that he died with no one bearing malice toward him. It is very meet that we, his brethren of the bar of the Fifth judicial circuit, extending the broad mantle of charity over his faults and his foibles, whatever they may have been, should give to his memory that due meed of praise which his many virtues merit, and place them of perpetual record in the annals of this court, where he was first admitted to the bar, and whose records are so largely connected with his professional career.

Judge MILLS was a great lover of poetry, and an omnivorous reader of the best poets. Of the minor poems, Gray's Elegy Written in a Country Churchyard was his favorite. His heart sometimes seemed "pregnant with the celestial fire," and while he seldom tried to "wake to ecstasy the living lyre" in poetical numbers, his speech was full of flights of fancy and imagination that spoke a highly poetical nature.

In the death of Judge MILLS the oldest member of this bar, and the sole resident survivor among us of those bright legal lights who made the bar of the lead-mining region of Wisconsin famous in its early history, has gone to that bourn whence no traveler returns. It is well to remember that his is the common fate of us all. Soon we all must follow him.

The boast of heraldry, the pomp of power,
And all that beauty, all that wealth e'er gave,
Await alike the inevitable hour:
The paths of glory lead but to the grave.

Can storied urn, or animated bust,
Back to its mansion call the fleeting breath?
Can Honor's voice provoke the silent dust,
Or Flattery soothe the dull, cold ear of Death?

No further seek his merits to disclose,
Or draw his frailties from their dread abode —
There they alike in trembling hope repose —
The bosom of his Father and his God.

RESOLVED: 1. That in the death of our distinguished brother, Judge JOSEPH TROTTER MILLS, we deeply sympathize and condole with his children and relatives in their bereavement, and join with them in mourning his departure.

2. That in the death of Judge MILLS our profession has lost a learned and eminent lawyer, the state a wise lawmaker, Lancaster one of its oldest and most respected residents, the members of this bar a kind and much loved friend and brother, and our country a devoted and patriotic citizen.

3. That, having consigned his body to the earth, we will ever cherish

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his memory in our hearts; and we commend his spirit to God who gave it.

Resolved: That we request that this memorial be spread upon the records of the circuit court for Grant county, Wisconsin, and that a copy thereof, under the certificate of the clerk and the seal of the court, be presented to each of the surviving children of our deceased brother.

JOHN G. CLARK,
A. R. BUSHNELL,
W. H. BEEBE,
Committee.

This report was unanimously adopted by the bar meeting of the Fifth circuit, and by order of the circuit court for Grant county it was entered of record in that court. By a like unanimous vote A. R. Bushnell, John G. Clark, and Thomas L. Cleary were appointed a committee to present the action of that bar meeting to this court, and ask that it be spread upon its records.

This court is immortal. We, the attorneys of this bar, the judges upon this bench, pass on, and our places are filled by others; but this court never dies. The faces that look down upon us from these walls, these memorial proceedings here to-day, admonish us of the common lot of man. As we have succeeded those who have gone before us, so shall we in turn make way for our successors, and they for others who shall come after them. But the records of this court are of perpetual memory. They will be scanned by the delvers of the profession through the coming centuries.

Most lawyers, I believe, have an abiding faith in the future life. And why should it not be so? The indestructibility of matter is a fixed fact of science. No material atom can be destroyed. Its form may be changed; it may be resolved into its constituent elements; but in some form, and somewhere, it is eternal. The gross matter which forms our bodies being eternal, shall it be said that the higher and more noble part of our being, that which thinks, and loves, and reasons, can be less enduring? No! a thousand times no!

Each of the many causes in this court has its appropriate record. While the record of each one of us, for good or ill, is forever made up in the great book of life, and depends not upon the appreciation, or the lack of it, of our fellow-men, it seems fit that for those who have achieved eminence in the profession, and have left their so visible marks upon our laws, a little space should be given in the records of this court, wherein their brethren who lived when they did may bear witness of their worth, their standing and character among us. Thus may we do honor to the memory of the dead, and inculcate useful lessons to the living.

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Death of Hon. Joseph T. Mills.

Judge MILLS has passed within the gates of the hereafter. He is dead. Death,

What is death? Oh, what is death?
'Tis the snapping of the chain,—
'Tis the breaking of the bowl,—
'Tis relief from every pain,—
'Tis the freedom of the soul.
'Tis the setting of the sun,
To rise again, to-morrow,
A brighter course to run,
Nor sink again, to sorrow.
Such is death. Yes, such is death.

What is death? Oh, what is death?
'Tis slumber to the weary,—
'Tis rest to the forlorn,—
'Tis shelter to the dreary,—
'Tis peace from every storm.
'Tis the entrance to our home,—
'Tis the passage to that God
Who bids His children come,
When their earthly course is trod.
Such is death. Yes, such is death.

I move your Honors that the record be made.

T. L. Cleary, Esquire, also spoke, but no record of his remarks has been preserved.

On behalf of the court Mr. Justice PINNEY responded as follows:

The memorial of the life, character, and public services of the late Judge JOSEPH T. MILLS, which has just been read in the hearing of the court, cannot fail to awaken a most interesting train of recollections in the minds of all citizens of our state who have been at all cognizant of public men and events during the period immediately ensuing our territorial organization, and with which the life work of Judge MILLS was more or less intimately connected; bringing from the dim and almost buried past so much of interest and significance in the history of the founding, building up, and development of the state. His life work links together very much that has been built into and become a part not only of that history but of the state itself in many very important essentials. His relations to the courts and the profession, and all that surrounds or relates to the administration of justice and of public affairs, at once arrests attention. At the time of his death he had become and for a long time had been a notable and unique figure in the history of the state. He was venerable for his years and prolonged public services in the profession, and notably for breadth of knowledge, learning, and

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experience at the bar and in the administration of justice in the circuit in which he had resided for more than sixty years.

A native of Kentucky, he came from Illinois to Wisconsin when it was a sparsely settled territory and at the time when the mining excitement in the lead region occurred, in quest of adventure and fortune, settling at Fort Crawford, and thereafter and until his demise he continued to be a conspicuous resident of Wisconsin. He had been well educated and received excellent discipline and training in legal learning under his uncle, Benjamin Mills, a judge of the court of appeals of Kentucky. At the time of his advent the courts of the territory had not been organized, and of law business there was then little or none, and the prospect of the future was far from cheering. The sparsely settled territory recently rescued from the control of the Indians had hardly put on the guise of a civilized state. Narrow field indeed was there here, for the present, certainly, to stimulate or gratify human ambition in the practice of his chosen profession. There were in Wisconsin at this time but two or three moderate sized villages, from one to two hundred miles apart. The towns and cities of the future were still in embryo or but on paper; the ways and marts of commerce had not even been planned; the means of inter-communication were by the Indian trails and along the waterways by barges or canoes, and all around was the primeval stillness of the wilderness instead of the hum and busy enterprise of the present. The country was yet to be built, as it were, and to be moulded into a civil state, and Judge MILLS gave himself and his best thought and effort cheerfully and with a zest to his allotted task of becoming, as he did, one of its builders and in a considerable sense taking a prominent part in forming its institutions and laws. What a field was here presented for earnest and well directed effort!

There was little to attract or interest a young man educated and fitted for life in the advancing and busy civilization of the older states, but the future legislator and judge turned his hand to whatever it found to do, like so many others under like circumstances in the opening and settlement of new countries. He was at first a tutor in the family of Gen. Zachary Taylor at Fort Crawford, and a school teacher as well afterwards. He took an active part in the opening drama of founding the state, and under circumstances and surroundings of the most interesting character he labored on until he and his associates at last, in the wisely planned and well developed modern state, realized the full fruition of their hopes. He met and mingled with the motley citizens of this wilderness, composed in the main of traders, hunters, and savages, and acquired an extensive acquaintance. The country in the meantime increased in wealth, population, and power; commerce and manufacturing were carried on in a small way, and the arts and meth-

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ods of civilized people were introduced and established, when the necessities of advancing civilization required the offices and services which an educated and intelligent lawyer alone could well and efficiently render. Having acquired a widely extended acquaintance, the future of one of such moderate ambition as he became at once secure.

His life was full of interesting incidents and adventures, which accorded well with the temperament and tendencies of one born and reared near the dark and bloody ground of Indian warfare in Kentucky. For the most part, however, his life ran in even and natural channels and in the midst of surroundings favorable to earnest study, vigorous thought, and quiet contemplation. He was a devoted student and a bold and original thinker. His habits were simple and plain, he cared little for dress or money, and was indeed quite an original character, giving little heed to the acquisition of wealth or the established ways and methods of social life in older and more fashionable communities. His wants were few and easily supplied; good books were his chief delight. He was eccentric in thought and action. He was not only a great student, but an omnivorous reader, and kept well abreast with modern ideas, theories, and current events. He was a man of originality and independence of thought; one who sought out his own lines of investigation and did his own thinking. He was essentially a radical—a reformer prompt to arraign and question any abuse however venerable and however formidable or numerous its supporters. He was prone to start new theories and lines of thought, surprising a listener frequently by their originality and the vigor and address with which they were presented. He gave early attention to the study of languages, both ancient and modern, and his self-acquired attainments as a linguist were very considerable, and mathematical and metaphysical studies were his especial delight. He will long be remembered as an interesting and instructive companion. He was of a kindly and sunny disposition. Long study and extensive reading had made him a full man, not only entertaining, but instructive.

As a lawyer he was especially thorough and efficient. He excelled in argument in the court of last resort, where he often converted defeat at the circuit into substantial victory. As a trial lawyer he was noted for his tact and good management, which, with his knowledge of human nature and a ready fund of wit and anecdote, rendered him a formidable antagonist. He did not manifest any ambition for political preferment or any desire to reap the higher rewards of professional effort or skill, but instead of seeking employment in cases involving matters of commerce, manufacturing, and corporate rights and interests, he was content with what fell to his lot as a village or rural lawyer, without any especial effort to extend or make his practice specially lucrative. He did not appear to care for money save as a means of satisfying reasonable

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wants. His arguments at the bar were characterized by vigor and clearness, and made entertaining by the witty and humorous conceits and repartees with which his efforts abounded. He was kindly and obliging to his fellows, and respectful and deferential to the court. Southwestern Wisconsin, a lead-mining region, was the earliest settled and the most important part of the territory, and throughout which Judge MILLS was held as a lawyer in deservedly high repute. The greater portion of his professional life was passed with such contemporaries and fellow-practitioners as Thomas P. Burnett, J. Allen Barber, Nelson Dewey, Orsamus Cole, W. R. Biddlecome, Ben C. Eastman, George W. Lakin, Stephen O. Paine, Charles and Frank Dunn, M. M. Cothren, Moses M. Strong, Samuel Crawford, M. M. Jackson, and James H. Knowlton. He was found a faithful and efficient public servant in all the various trusts with which during his long life the people frequently honored him. He was a learned and able lawyer, and an upright judge. He served two terms of six years each as judge of the Fifth judicial circuit. He was thoroughly in sympathy with the modern spirit of reform in legal procedure, and it was largely, if not mainly, due to his earnest and diligent efforts that the New York Code was adopted in this state in 1856, when he was a member of the assembly. It is due to the truth of history to add that in the main it has withstood any considerable attempts to modify or amend it, and still survives with a better fate in these respects than has attended it in the state of its original adoption.

The frequency with which memorial occasions such as the present occur at the bar of this court admonishes us in no uncertain tones that the pioneer lawyers and jurists who have performed honorable and important service in their day and generation in establishing on a firm and sure basis a wise and intelligent system of jurisprudence, and who have served the state long and faithfully in its administration, are fast passing away to be seen and known no more forever. They have been at all times a remarkable group of men, and have rendered a service to the state in true statesmanship and in the cause of law and order, the value and importance of which cannot be over-estimated. The work may at times have fallen to the lot of men not entirely equal to the task, but the result of their labors, remaining in honored use and repute, indicates that the duties devolved on them thus far have been performed in all fidelity and honor. In the hope that judicial duty in the future, as in the past, will be faithfully, firmly, and intelligently performed, must rest the security and efficiency of our free institutions. May all who serve in such stations in the future, like our deceased friend, receive at last the well earned plaudit: "Well done, good and faithful servant."

The proceedings and usual order will be entered upon the records of the court.

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CASES DETERMINED

AT THE

August Term, 1897.

BROWN & HAYWOOD COMPANY, Respondent, vs. TRANE and wife, imp., Appellants.

November 17 — December 10, 1897.

Lien of subcontractor: Notice to owner.

The plaintiff, as subcontractor, furnished glass for a building to the principal contractor, who used it in the building, but discovering that a portion of it was defective notified the plaintiff, who thereupon shipped new glass to replace that which was defective. Such new glass was received at the railroad depot agreed upon as the place for delivery, but was left there and never used in the building. The plaintiff gave to the owner of the building written notice of his claim for a lien within sixty days after the second shipment, but not until more than sixty days after the first glass was used in the building, and not until after such owner had settled with and paid the principal contractor. *Held*, that the right to a lien under sec. 3315, R. S., was lost by such delay in giving the required notice.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

The defendant Gross, as principal contractor, entered into a contract May 25, 1895, with the defendant *James A. Trane*, to erect and construct for him, at La Crosse, Wisconsin, a brick building, and to furnish all labor and materials in and about the erection and construction thereof. Afterwards the plaintiff, a manufacturer and dealer in plate glass, entered

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into a contract with Gross to furnish, on board the cars at La Crosse, Wisconsin, all the plate glass for said building, at the agreed price of $357.46, and did furnish and deliver the required quantity of glass October 11, 1895, which by that date was used in the said building. Soon after the setting and placing of this glass in the building, the defendants discovered that two of the large plates were defective, and the plaintiff was thereupon notified that they could not be used. The plaintiff tried to remove the defects in said glass, and as late as November 12, 1895, furnished materials which were used for the purpose of removing the stains therefrom. The plaintiff's agent met the defendants *Trane* and Gross at the building in the early part of November, 1895, at which time *Trane* notified the plaintiff that he would not pay for the glass until there was new glass furnished to complete the plaintiff's contract. December 10, 1895, the defendant Gross wrote the plaintiff: "We can do nothing with the spots in the plate. I have tried everything without success. Before you make draft for glass, kindly have this fixed up." Thereupon plaintiff shipped two new plates, for the purpose of replacing the defective ones, which were received at La Crosse, December 18, 1895. The new plates were received by the principal contractor, Fred A. Gross, at one of the freight depots at La Crosse, Wisconsin, where plaintiff contracted and agreed to deliver said glass, December 18, 1895, where they have ever since remained. The plaintiff gave written notice of its claim and right of lien against the building and premises January 11, 1896; and this action was brought by the plaintiff, as subcontractor of the defendant Gross, to foreclose a lien for said glass against the real estate and building of the defendant *James A. Trane*, the owner thereof; and the question is as to the right of the plaintiff to maintain and enforce a lien against said building and real estate for said materials, it having neglected "to give notice in writing to the owner" within sixty days after furnishing

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such material. Plaintiff had judgment in the circuit court for the value of the glass furnished, with the usual order or decree of sale, from which the defendants appealed.

For the appellants there was a brief by *Fruit & Brindley*, and oral argument by *J. J. Fruit.*

George H. Gordon, for the respondent, argued, *inter alia*, that, the plaintiff having furnished materials to be used in the building, and it not being its fault that they were not used therein, it was entitled to the lien given by statute. *Esslinger v. Huebner*, 22 Wis. 632; *Spruhen v. Stout*, 52 id. 523; *Cooper v. Cleghorn*, 50 id. 113. Its right to a lien cannot be defeated by the failure of the defendants to incorporate the materials in the building. *Howes v. Reliance Wire-Works Co.* 46 Minn. 44; *Charnley v. Honig*, 74 Wis. 163; *John Paul L. Co. v. Hormel*, 61 Minn. 303. The plaintiff's contract was incomplete until it furnished the new glass, and notice was in due time given within sixty days from that date. Boisot, Mechanic's Liens, § 476; *Fowler v. Bailley*, 14 Wis. 125; *Schcible v. Schickler*, 63 Minn. 471; *Worthen v. Cleaveland*, 129 Mass. 570; *McKelvey v. Jarvis, Halpin & Co.* 87 Pa. St. 414; *McIntyre v. Trautner*, 63 Cal. 429; *St. Louis Nat. Stock Yards v. O'Reilley*, 85 Ill. 546; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507.

PINNEY, J. The statute (sec. 3315, R. S.) provides: "Every person who, as subcontractor of a principal contractor, performs any work or labor for or furnishes any materials to the principal contractor, . . . in any of the cases mentioned in the preceding section, shall be entitled to the lien and remedy given by this chapter, if, *within sixty days* after performing such work or labor or furnishing such materials, he shall give notice in writing to the owner, or his agent, of the property to be affected by such lien, setting forth," etc.

The plate glass which the plaintiff furnished under its contract with Gross, the contractor, was delivered to him,

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and used in the building, October 11, 1895. Had the glass been suitable, and in compliance with the plaintiff's contract, it does not admit of any doubt but that the plaintiff's time within which to give notice of its claim of lien therefor would have expired sixty days thereafter, or as early as December 11th. It did not give the necessary notice until January 11th next thereafter. In the meantime the defendant had settled with and paid Gross, the contractor, and Gross had made an assignment for the benefit of his creditors. The want of timely notice to the defendant *Trane* is a fatal objection to the plaintiff's case. The statute giving the remedy sought by the plaintiff as subcontractor is, at best, a harsh one, and parties invoking it are bound to bring themselves strictly within its provisions. It is clear that the glass was defective and not in compliance with the contract. This is really conceded by the plaintiff's shipment to the contractor, Gross, at La Crosse, of two new plates to supply the place of those which were defective. These plates were never delivered to or accepted by *Trane*, the owner, and they were never wrought or put into the building. The claim that the delivery of the two substitute plates for the defective ones shipped to Gross, the contractor, at La Crosse, and which arrived there December 18, 1895, makes that *the last date* upon which the plaintiff furnished said materials, is wholly untenable. Work done or materials furnished within six months prior to the filing of a mechanic's lien to compensate for defective performance of a building contract completed more than six months prior will not extend the time and preserve the right to file such lien. *Harrison Homœopathic Asso.* 134 Pa. St. 558. In *Kennebec Framing Co. v. Pickering*, 142 Mass. 80, where a person furnished lumber at a certain price per 1,000 feet, at different times, under an entire contract in the erection of a building, it was held that he lost his lien if he neglected to file his statement of the amount due him within thirty days after the last

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item was furnished which was actually used in the erection of the building. The last glass actually used in the building in the present case was furnished more than sixty days before the plaintiff gave notice of its claim of lien. *Gale v. Blaikie*, 129 Mass. 206.

It does not appear that there is any ground for claiming that the objections made to the two plates, as defective, were made by collusion between *Trane*, the owner, and Gross, the contractor, or that the settlement with and payment to Gross were made collusively or with intent to defeat the plaintiff's claim for a lien. The objection of want of timely notice of the plaintiff's claim is decisive of his right to recover.

The judgment of the circuit court must be reversed, and the cause remanded with directions to dismiss the plaintiff's complaint.

By the Court.— Ordered accordingly.

BEETLE and others, Appellants, vs. ANDERSON, Respondent.

November 18 — December 10, 1897.

Sale of chattels: Caveat emptor: *Fraud: Instructions to jury: Agency: Damages: Parties.*

1. The rule of *caveat emptor* has no application where a purchase is induced by fraudulent representations on the part of the seller.
2. An error in instructing the jury, in a case where a purchase was induced by fraudulent representations, that the rule of *caveat emptor* applies, is not cured by a further instruction that a purchaser has a right to rely upon representations made by the seller as to matters within the knowledge of the seller but not known to the purchaser.
3. In a case where an agent, acting for the purchasers, received representations from the seller as to the value of the property included in the mortgage proposed to be purchased by him, and the financial standing of the indorsers of the notes secured thereby,

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which were false, and which being reported by him to the plaintiffs induced them to purchase such mortgage, an instruction that if such agent was not appointed the agent of the defendant his representations to the plaintiffs would not bind him, and, if he was such agent, the defendant would not be bound thereby unless the agent made them with knowledge that they were false, or made them with defendant's knowledge and the defendant knew them to be false or had no reason to believe them to be true, is erroneous, because the seller is responsible in such a case for the representations made by him to the plaintiffs' agent, even though the latter may, for some purposes, represent the seller also.

4. The measure of damages recoverable by one who was induced to purchase a mortgage by fraudulent representations as to the value of the mortgaged property and the responsibility of the indorsers of the notes secured thereby, is a sum equal to that portion of the mortgage debt which the securities, when properly applied, will fail to pay, when, if they had been as represented, they would have been adequate to pay the whole debt.

5. Where several persons, induced by false representations, purchased a mortgage, each contributing one fourth of the money, *held*, that their interests in the securities were joint, and they might properly sue jointly for the fraud.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

This is an action to recover damages for fraud in the sale of an interest in a mortgage on lands and personal securities. The defendant sold to the plaintiffs an undivided one-half interest in certain promissory notes which were secured by mortgages on land and on chattels, and by the pledge of certain stock in a corporation for manufacturing lumber. The notes were of the amount of $20,619.20. The transaction was negotiated by a broker, one Charles Wattley, who seems to have been employed by the plaintiffs to find opportunities for safe investments. It is claimed that the defendant falsely represented to this agent of the plaintiffs that the real-estate mortgage which secured these notes was a purchase-money mortgage; that the lands described in it had been bought by the mortgagor from the Wisconsin Lum-

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ber & Manufacturing Company, of La Crosse, for $20,619.20, which was the true and actual consideration for which the land had been sold to the mortgagor, and that the lands were of that value; whereas, in truth and in fact, the lands had been sold to the mortgagor for $13,750, as the defendant well knew. The notes bore the indorsement of the Wisconsin Lumber & Manufacturing Company, of La Crosse. It is alleged that the defendant represented to the said agent, and so to the plaintiffs, that that corporation had a paid-up capital of $100,000, and a surplus of at least $10,000, and was in a prosperous condition, and solvent; that it had recently declared and paid a cash dividend of seven per cent., and had sufficient surplus and net earnings to pay a dividend each year; that its stock was at a premium; that so it was a responsible indorser of the notes. The notes were also secured by chattel mortgage and by pledge of stock of the corporation to the amount of $10,000, which was represented to be worth above par; whereas, in truth and in fact, the corporation had not paid a cash dividend, and was not in a prosperous condition, but was practically insolvent, and its stock was not worth par, and it was not a responsible indorser, nor the pledged stock of any value as security, and the securities were inadequate; all of which the defendant well knew, or should have known. The defendant denied the making of the alleged representations, and that denial formed the principal issue tried. The verdict was for the defendant. From judgment on that verdict the plaintiffs appeal.

For the appellants there was a brief by *Fruit & Brindley*, and oral argument by *J. J. Fruit.*

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee.* They contended, *inter alia*, that, this being an action *ex delicto*, the plaintiffs could not recover without showing that the defendant knew of the falsity of the representations made on his part. *Sweeny v.*

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Vroman, 60 Wis. 278; *Pierce v. Carey*, 37 id. 232; *Barndt v. Frederick*, 78 id. 1; *Rood v. Taft*, 94 id. 380; *Kelly v. Troy F. Ins. Co.* 3 id. 259; *Ring v. Ogden*, 45 id. 305; *Union P. R. Co. v. Barnes*, 64 Fed. Rep. 80; *Lamberton v. Dunham*, 165 Pa. St. 129; *Sylvester v. Henrich*, 93 Iowa, 489; *Kountze v. Kennedy*, 29 L. R. A. 360. If an agent makes a misrepresentation on his own responsibility, believing it to be true, and the principal has not directed him to make it, and has no knowledge that he has made it, the representation will not amount to fraud on the part of either principal or agent. *Coddington v. Goddard*, 16 Gray, 436; *Smith v. Tracy*, 36 N. Y. 79; *Cornfoot v. Fowke*, 6 Mees. & W. 358, 368.

NEWMAN, J. The principal errors claimed are in the instructions of the court.

The court instructed the jury, at the defendant's request, that "it was the duty of the plaintiffs to make investigation for themselves as to the nature, quality, and value of the securities offered and purchased by them; and the maxim, 'let the purchaser beware,' is applicable to the sales of all species of personal property." The issue in the case was whether the sale had been induced by fraudulent representations of the seller. The rule *caveat emptor* has no application to cases of fraud. Story, Sales (4th ed.), § 378. While it is always wise for the purchaser to be on the alert against deception, the law still permits him to confide in the statements of the seller; and it makes no difference in the rule if the purchaser makes some investigation for himself, where the truth or falsity of the representations are not readily discoverable by him. *Porter v. Beattie*, 88 Wis. 22. So this instruction was error. But the defendant claims that the error was cured, and its bane neutralized, by an instruction which the court gave later of its own motion. The court said: "When a person makes representations of material matters affecting the kind, quality, or value of property,

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for the purpose of inducing parties to purchase the same, which are within the knowledge of the seller and are not known to the purchaser, the purchaser has the right to rely on such representations." This really seems to be unexceptionable. But it cannot be a complete antidote for the former error, for, when combined, the compound is scarcely, if any, less baneful than the single unmixed element of error. Combined, the instructions are to the effect that, although the plaintiffs had the right to rely on the representations made by the defendant, yet, if they did so, it was at their own risk, for the rule of *caveat emptor* applied, and it was their business to investigate for themselves. That certainly is not the law as applied to the issue and facts of the case, and must necessarily mislead the jury.

The court also instructed the jury, at the defendant's request: "If Charles Wattley was not appointed and made the agent of the defendant, then his representations to the plaintiffs could not bind the defendant. If he, in fact, was made and appointed the agent of the defendant, then his representations to the plaintiffs would not render the defendant liable, unless such representations were made by the said Wattley knowing them to be false, or were made by him with the knowledge of the defendant, and the defendant knew them to be false or had no good reason to believe them to be true." This instruction seems to be based upon an entire misconception or perversion of the proper effect of the evidence bearing upon the relation which the parties to the transaction bore to each other and to the transaction itself. Wattley, clearly, was the agent of the plaintiffs. He negotiated the transaction for them. They acted only through him. Representations made to him were, in legal contemplation, made to them. Although he may also, for some purposes incident to the negotiations, have represented the defendant, as a mere broker often represents both parties, that does not disturb the rule. The de-

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fendant is responsible for such representations as he makes to the plaintiffs' agent, and upon which the agent or plaintiffs act in making the purchase, whether the representations are communicated to his principals, by the agent, or not. And it makes no difference whether the misrepresentations are wilful. The seller is bound to know that the representations which he makes to induce the sale of his property are true. *Miner v. Medbury*, 6 Wis. 295; *Cotzhausen v. Simon*, 47 Wis. 103; *Montreal River L. Co. v. Mihills*, 80 Wis. 540; *Gunther v. Ullrich*, 82 Wis. 222. The fact that Wattley was the agent of the plaintiffs also, seems to have been completely obscured and lost in the verbiage of the instruction.

The plaintiffs complain that the court failed to give the correct rule of damages. The rule given was the difference between the actual value of the securities and their value as represented. No doubt the proper rule for this case is comprehended in this general statement. But perhaps more definite and specific instructions were desirable in this case. As applied to this case, the rule would mean a sum equal to that portion of the mortgage debt which the securities, when properly applied thereto, will fail to pay, on the hypothesis that, if they had been as represented, they were adequate to pay the whole debt. If the securities had been already foreclosed and applied, evidence of that fact would be pertinent and cogent to establish the actual amount of damage. *Foster v. Taggart*, 54 Wis. 391.

The defendant alleged in his answer, and claims on the proofs, that there is a misjoinder of plaintiffs and of causes of action. The point is this: The evidence tends to show that the plaintiffs furnished the money which was invested in these securities by each contributing equally one fourth. They proposed, at one time, to have a one-fourth interest assigned to each separately. In fact, the assignment was made to them all *jointly*. So their interests in the securities

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are joint, and not several. The proportionate interest of each in the securities is not significant. Their interest in whatever affects the value of the securities is joint, and not several. The action was well brought by them jointly.

For the errors in the instructions, the judgment must be reversed.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

HEGE and wife, Respondents, vs. THORSGAARD, Appellant.

November 18 — December 10, 1897.

Specific performance: Vendor and purchaser: Contracts: Evidence: Harmless error.

1. Under a verbal contract by which defendant agreed to buy a certain eighty-acre tract of land and sell it to the plaintiff on the same terms as he purchased it, and to execute to her a land contract therefor, and to apply on the price thereof the amount he might receive for a forty-acre tract which the plaintiff deeded to him, less certain indebtedness of plaintiff to him, possession of the eighty-acre tract was delivered to the plaintiff pursuant to the contract, but the defendant afterwards sold the forty-acre tract for $1,100 and refused to account therefor, and also leased the eighty-acre tract to the plaintiff's husband without her knowledge, and refused to make to her the land contract as agreed. *Held*, that the plaintiff was entitled to an accounting and to specific performance of the contract.
2. In such action, where it appeared that the defendant had in fact executed a long lease of the forty-acre tract, giving the lessee an option to purchase, and that he admitted that he was chargeable with $1,100, an error in finding that he had sold the land for $1,100 is held to be harmless.
3. Evidence in such action that the entire consideration for the purchase of the eighty-acre tract was to be paid from the proceeds of the plaintiff wife's separate estate, and her positive testimony that the contract was to be made to her, is *held* to justify a finding that the contract was to be made to her, and not to her husband, though she sometimes used the term "we" in testifying of it.

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Hege and wife vs. Thorsgaard.

APPEAL from a judgment of the circuit court for Vernon county: O. B. WYMAN, Circuit Judge. *Affirmed.*

Action to set aside a written lease of lands containing an option to purchase, and for a specific performance of a verbal contract for the purchase of real estate. The complaint contained allegations sufficient to admit evidence appropriate to establish the facts found by the trial court, and which were found upon the evidence. Such facts are substantially as follows:

(1) Plaintiff *Dorothea P. Hege*, wife of plaintiff *Amund P. Hege*, was the owner of forty acres of land.

(2) *Dorothea P.* and defendant entered into an agreement to the effect that the latter should purchase of one Hans Thorsen an eighty-acre tract of land owned by him, and sell the same to the former at cost; that defendant should take a deed from *Dorothea P.* of her forty acres of land and hold the same as security for $400 of the down payment on the land, to Thorsen, and such other indebtedness of plaintiffs to defendant as then existed; and that when he should sell the forty, the amount received therefor, after deducting said $400 of down payment and such indebtedness, should be applied on the balance of the purchase money of the Thorsen land, and that plaintiff should have six years, or any time before the expiration of that period, to pay the balance of such purchase money, with the right in the meantime to pay in sums of not less than $100, all deferred payments to draw interest at the rate of six per cent. per annum; that plaintiffs should pay all taxes, and that defendant should execute a land contract in writing, to said *Dorothea P.* in accordance with such agreement, and put the plaintiffs in possession of the farm.

(3) Pursuant to such agreement, defendant purchased of Thorsen the eighty acres of land, paying down thereon $500, $400 of which he furnished, and $100 plaintiffs furnished, and gave his notes for the balance of the purchase money with a mortgage back on the land to secure the payment

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thereof. Plaintiff *Dorothea*, also pursuant to the agreement with the defendant, deeded to the latter her forty acres of land, and thereupon possession of the Thorsen tract was delivered to plaintiffs by the defendant, and they have ever since remained in such possession.

(4) The defendant thereafter neglected and refused to execute the land contract as agreed upon, but, without the knowledge of plaintiff *Dorothea*, and without her consent, executed and delivered to her husband, *Amund P.*, a lease of the land for the term of six years, reserving annual rent equivalent to the interest agreed upon, with the option to *Amund P.* to purchase the land at the expiration of the term, on payment of $1,900.

(5) The defendant, before the commencement of the action, sold the forty-acre tract for $1,100, but refused to account therefor as agreed upon, and insisted upon deducting therefrom money advanced to *Amund P.* after the making of the agreement aforesaid and without the knowledge of said *Dorothea P.*

(6) The whole amount defendant is entitled to deduct from the $1,100 received for the forty acres of land, under the agreement made when such forty was conveyed to him, is $660, leaving a balance of $440 which should be applied upon the $1,900 back on the Thorsen land, which sum is due to the defendant before six years from the 1st day of March, 1895, with interest at the rate of six per cent. per annum, payable annually after March 1, 1896, interest having been paid up to that time; and said *Dorothea P.* is entitled to pay the purchase money at any time, or any part thereof not less than $100 at a time.

As a conclusion of law from the facts found, the court determined that *Dorothea P.* was entitled to judgment reforming and changing the lease made to *Amund P.* so that it would be a land contract in the usual form, running to her, and in accordance with the agreement made as set forth in the findings of fact.

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Numerous exceptions were filed to the findings of fact and conclusions of law, to preserve for review the questions discussed in the opinion. Judgment was entered pursuant to the foregoing, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *Smith & Griffin*, and for the respondents on a brief signed by *O. B. Thomas.*

MARSHALL, J. At the commencement of the trial there was an objection to any evidence under the complaint, upon the ground that it fails to state facts sufficient to constitute a cause of action. The complaint is quite lengthy, but in substance, by proper allegations, it sets forth the making of a contract between defendant and plaintiffs, by which the former agreed to sell to the latter a particular eighty-acre tract of land for $2,400 on the terms he purchased it of one Thorsen, and apply on the purchase money the amount he might receive for forty acres of land deeded to him by plaintiff *Dorothea*, after deducting from such proceeds certain indebtedness, then existing, of plaintiffs to defendant; that pursuant to such contract possession of the eighty-acre tract of land was delivered to plaintiffs by defendant, and that thereafter defendant sold the forty for $1,100 and refused to account therefor according to the agreement; and that without the knowledge of *Dorothea*, he made a lease of the eighty to *Amund*, and refused to make a land contract to her as agreed upon. Such allegations were sufficient to make a good cause of action in plaintiffs' favor, for an accounting and for specific performance, so the demurrer was properly overruled.

At the close of plaintiffs' evidence there was a motion for a nonsuit made and overruled. Error is assigned on that ruling and on the exceptions to the findings of fact because not sustained by the evidence. All of these rulings may be properly considered together. If, on the evidence, we cannot disturb such findings, we must hold the motion for a

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nonsuit to have been properly overruled, for such findings are sufficient to sustain the judgment appealed from. We are not prepared to approve the judgment in form, but wherein it departs in that regard from what would be strictly proper, in view of the facts found, defendant is in no way prejudiced; therefore such departure is not reversible error. The effect of the judgment is to wipe out the lease made to *Amund P.* entirely, and to require the defendant, after applying the money received from the forty, in accordance with the findings, to make a land contract to the plaintiff *Dorothea* in accordance with the verbal contract as established by such findings. A careful consideration of the evidence leads to the conclusion that while it is not very clear and satisfactory, viewing it without the aids that a trial judge is always presumed to have to enable him to discover the truth, we are unable to say that any of the material findings are against the clear preponderance of the evidence. Therefore they must stand as verities in the case. There is considerable evidence in the record, which, if believed, sustains all of such material findings. On the subject of who was the contracting party with the defendant, plaintiff *Dorothea*, while using the pronoun "we," referring to herself and husband, at times, testified positively that the land contract was to be made to her, and there is no controversy but that the entire consideration that was paid consisted of the proceeds of her individual property. No doubt the latter circumstance was quite persuasive with the trial court as to what the fact was, respecting whether the contract was with *Dorothea P.* or her husband. There was no serious controversy as to the essential terms of the contract upon which the defendant sold the land. The dispute was in respect to whether the agreement to sell was with *Dorothea* or her husband, and whether a land contract was to be given, or the lease with an option to purchase, which in effect was to accomplish all the purposes of a land contract, and as to

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whether defendant was entitled to deduct from the proceeds of the forty acres of land any further sum than was allowed by the court. These disputed questions are all found in plaintiffs' favor on the evidence.

Defendant acknowledged that he had treated the forty as his own by giving a long lease, with an option to purchase, and that in a pretended settlement with the plaintiff *Amund* he admitted that he was chargeable with $1,100 therefor. So, if the finding that defendant sold the land for $1,100 is not strictly accurate, defendant is not prejudiced thereby. His conduct with reference to the land was such as to warrant the court in holding him liable, the same as if an actual sale of the land had been made. After having made a long lease of the forty without consent of plaintiff *Dorothea*, with an option to the lessee to purchase it, and claiming to be the owner thereof, and acknowledging liability therefor for the sum of $1,100, he cannot complain that the court charged him accordingly.

By the Court.— The judgment of the circuit court is affirmed.

THE STATE EX REL. EMBERSON, Appellant, vs. BYRNE, Respondent.

November 18 — December 10, 1897.

Municipal corporations: Powers of acting mayor: When term of office commences: Custom.

1. Under sec. 3, subch. III, of the charter of the city of La Crosse (ch. 162, Laws of 1887), and sec. 4, subch. II, of the same act, the mayor of the city can perform no official duty while absent from the city. Consequently the appointment of a board of police and fire commissioners by virtue of ch. 247, Laws of 1897, is void, if made by him while so absent.
2. The president of the common council being authorized to execute all the powers and perform all the duties of the mayor during

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that official's absence from the city, the appointment by him of a board of police and fire commissioners, when acting mayor in such a case, was legal and valid.

3. It being the uniform custom in this state for old officers to go out of, and newly elected officers to come into, office at noon of the day appointed by law for the term to commence, *held*, that such custom contravenes no statute and has the force of law.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

The case is stated in the opinion.

For the appellant there was a brief by *A. E. Bleekman* and *Ray S. Reid*, and oral argument by *A. E. Bleekman* and *F. H. Bloomingdale.* They argued, among other things, that the mayor is, by the charter of La Crosse, the head of the police and the chief executive officer. Under ch. 247, Laws of 1897, in a city of this class, the mayor has the sole power to appoint the board of police and fire commissioners. An appointment by the mayor in office when that act took effect must be presumed to be regular and legal and not in excess of his authority. Tiedeman, Mun. Corp. § 77; *People ex rel. Att'y. Gen. v. Clingan*, 5 Cal. 389; *State ex rel. Reeves v. Ferguson*, 31 N. J. Law, 107, 119; Throop, Pub. Off. 558; *Mandeville v. Reynolds*, 68 N. Y. 528, 535. The question how the mayor exercised his discretion in making this appointment cannot be raised in the court. *Marbury v. Madison*, 1 Cranch, 137, 170, 171; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547; *State ex rel. Kennedy v. McGarry*, 21 Wis. 496, 497. The acts of officers *de facto*, while in office, are valid as to the public and third persons, and cannot be inquired into collaterally. *State ex rel. Knowlton v. Williams*, 5 Wis. 308, 313; *Lask v. U. S.* 1 Pin. 77, 80; *Tolle v. Stone*, id. 230, 232, 233; *In re Boyle*, 9 Wis. 264; *Dean v. Gleason*, 16 id. 1, 18; *State v. Bloom*, 17 id. 521; *State ex rel. Wood v. Goldstucker*, 40 id. 124, 129; *Chicago & N. W. R. Co. v. Langlade Co.* 56 id. 614, 625, 629; *Cole v.*

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Black River Falls, 57 id. 110; *In re Radl*, 86 id. 645; *Bedford v. Rice*, 58 N. H. 446; *People ex rel. Bush v. Collins*, 7 Johns. 549; *People v. White*, 24 Wend. 520, 525; *Cocke v. Halsey*, 16 Pet. 71, 85; *Bucknam v. Ruggles*, 15 Mass. 180. Appointments by *de facto* officers are held good. *State ex rel. Whitbeck v. Alling*, 12 Ohio, 16; *State ex rel. Newman v. Jacobs*, 17 id. 143; *People ex rel. Norfleet v. Staton*, 73 N. C. 546; *Mallett v. Uncle Sam G. & S. M. Co.* 1 Nev. 188; *People ex rel. Hodgkinson v. Stevens*, 5 Hill, 616, 630; *In re Burke*, 76 Wis. 357. The powers of the president of the council under the charter are merely those of a temporary, emergency officer, to do in place of the mayor things to be done at a particular time when the mayor is unable to do them. Only such an absence from the city as will render the mayor unable to perform his duties is intended to give the president power to act. *Mayor of Detroit v. Moran*, 46 Mich. 213; *People ex rel. Wood v. Lacombe*, 99 N. Y. 43. At the time the appointment was made by the president, he was not a city officer, his term having expired at midnight previous thereto. Custom cannot change the law as to the time of taking office. Throop, Pub. Off. sec. 322; *Vogel v. State ex rel. Laud*, 8 N. E. Rep. 164; *State v. Mounts*, 15 L. R. A. 243, 248; *State ex rel. Warden v. Knight*, 82 Wis. 151, 159.

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee*.

CASSODAY, C. J. This is an action of *quo warranto*, brought by the relator, to oust the defendant from the possession of the office of chief of police in La Crosse, on the ground that the relator is rightfully entitled to the office. Issue being joined and trial had, the court found in favor of the defendant; and, from the judgment entered thereon, the relator brings this appeal.

It appears from the record, and is found by the court or

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admitted, that April 17, 1897, D. Frank Powell was mayor of La Crosse, having been elected in April, 1895, and continued to be such until April 20, 1897, when his term of office expired; that J. B. Murray was an alderman and president of the common council, having been elected such president October 11, 1896, and continued to be such until April 20, 1897, when his term of office expired; that the defendant, *Hugh H. Byrne*, was chief of police and had been for several years, and that his term of office was not to expire until October, 1897; that ch. 247, Laws of 1897, was published and went into effect April 17, 1897; that in and by that act it was, in effect, provided that in all cities of the second and third classes there shall be a board of police and fire commissioners, consisting of four citizens, not more than two of whom shall belong to the same political party when appointed, to be appointed by the mayor before the first Monday of May, 1897; that thereafter no person should be appointed to any position, either on the police force or in the fire department in any such city, except with the approval of such board; that, as soon as possible after the first members of the board shall enter upon their office, they shall prepare and adopt such rules and regulations to govern the selection and appointment of persons to be thereafter employed in either the police or fire department of the city as, in their judgment, should be adapted to secure the best service for the public in each department; that in April, 1897, James McCord was duly elected mayor of the city, and qualified as such, and at noon April 20, 1897, entered upon and took possession of his office as such mayor; that April 11, 1897, said Powell departed from La Crosse, and went to his office in St. Paul, Minnesota, and at no time returned to La Crosse, nor to this state, until after April 21, 1897, and during all that time he was continuously absent from the state of Wisconsin; that April 19, 1897, Powell, at his office in St. Paul, made an appointment in writing, appointing

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George E. Powell, William R. Finch, David H. Palmer, and F. R. Hickish the fire and police commissioners in and for the city pursuant to ch. 247; that April 20, 1897, the persons so appointed filed their oaths of office, and thereafter assumed to act as such commissioners; that April 20, 1897, at 10 o'clock a. m. of that day, said James B. Murray, as president of the council and acting mayor of the city, and while presiding over the last meeting of the old council, appointed in writing, and announced to the council then in session the appointment of, Joseph W. Losey, James J. Hogan, I. H. Moulton, and John Dengler as police and fire commissioners in and for the city, pursuant to ch. 247, and then and there filed such appointment in writing; that April 22, 1897, the persons so appointed by Murray duly filed their oaths of office, as required by the charter; that April 27, 1897, McCord, as mayor, appointed four other persons as such commissioners; that April 28, 1897, the persons appointed by McCord duly filed their oaths of office; that each of the three boards so appointed had duly adopted rules and regulations as required by ch. 247; that May 3, 1897, the board appointed by Murray organized as such board, and thereafter and ever since have assumed to act and be such board; that May 3, 1897, the persons so appointed by McCord organized as a board, and ever since have assumed to act as such; that May 25, 1897, the persons so appointed by Powell appointed the relator as chief of police in and for the city; that May 26, 1897, the relator filed his oath of office, and gave the requisite bond, and demanded the possession of the office from the defendant, who refused to deliver such possession to the relator; that June 14, 1897, the board so appointed by Murray filed a written appointment of the defendant as chief of police of the city; that the defendant thereupon filed his oath of office as chief of police of the city, and duly made, executed, and filed the requisite bond.

The charter required every new common council, at their

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first meeting, to elect one of their number president, and further provided, in effect, that, in the absence of the mayor, the president should preside over the meetings of the common council, and, during the absence of the mayor from the city or his inability from any cause to discharge the duties of his office, the president should execute all the powers and discharge all the duties of the mayor; and that in the case of any vacancy in the office of mayor, if no new election should be ordered, the duties of the mayor should be performed until the end of the term, as therein provided in case of the absence of the mayor or his inability to act. Sec. 3, subch. III, ch. 162, Laws of 1887, and sec. 4, subch. II, of the same act. It is clearly implied from such language that the mayor shall perform no official duty as mayor while absent from the city; certainly not while absent from the state. This seems to be abundantly supported by authority. *Wilcox v. Johnson*, 34 Kan. 655; *Atchison, T. & S. F. R. Co. v. Rice*, 36 Kan. 593; *Beamer v. Winter*, 41 Kan. 297; *Share v. Anderson*, 7 Serg. & R. 43; *S. C.* 10 Am. Dec. 421; *Brown v. McCormick*, 28 Mich. 215; *People v. Burt*, 51 Mich. 199. The mayor was absent from the state at the time ch. 247 went into effect, and continued absent until after his term of office had expired. This being so, there can be no question but that Murray, as the president of the common council and acting mayor, had authority to appoint the board of commissioners as and when he did. *O'Mally v. McGinn*, 53 Wis. 353.

The term of office of the new mayor (McCord) and the new common council "commenced on" April 20, 1897. Laws of 1887, ch. 162, subch. II, sec. 2. The terms of our state officers commence on the first Monday in January next succeeding their election. S. & B. Ann. Stats. sec. 128. Under that statute it has been the uniform custom for the old officers to go out, and the new officers to come in, at noon of that day. The same custom prevails under similar federal

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statutes. R. S. of U. S. sec. 152. Such custom contravenes no statute, and has the force of law. *State ex rel. Hudd v. Timme*, 54 Wis. 340; *Wright v. Forrestal*, 65 Wis. 341. It follows that McCord and the new common council did not go into office until noon of April 20, 1897. At that time the board of commissioners had been legally appointed by Murray, as president of the common council and acting mayor, in the absence of Mayor Powell from the state. It follows that the attempt to appoint such board of commissioners by Mayor Powell while in Minnesota was a nullity. It also follows that, prior to the time when Mayor McCord and the new common council came into office, the board had been legally appointed; and hence the attempt to appoint another board by McCord was ineffectual. Manifestly, the relator is not entitled to the office of chief of police as against the defendant.

By the Court.— The judgment of the circuit court is affirmed.

SCHOOL DISTRICT NO. 4 OF THE TOWN OF CAMPBELL, Appellant, vs. BAIER and another, Respondents.

November 18 — December 10, 1897.

School district board: Meetings: Defective call: Void contract: Unauthorized payment by treasurer.

1. A special meeting of a school district board attended only by two of the members, who had called the meeting by serving on the third member a notice which failed to state the place where it was to be held, was not a legal meeting.
2. A contract with a teacher attempted to be authorized at such meeting is void, especially with one not holding a certificate authorizing her to teach; and if the treasurer pays the salary of such teacher without the proper order of the clerk therefor, he and his surety are liable on his bond.

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School District No. 4 of the Town of Campbell vs. Baier and another.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

This is an action brought to recover $270.93, on the bond of the defendant *August Baier* as treasurer of the plaintiff school district, the defendant *Dawson* being surety upon the said bond.

The facts, in brief, as they appeared upon the trial, are that the defendant was treasurer of the plaintiff district for the term of three years, and gave the bond in suit, which was signed by *Dawson* as surety, and was conditioned for the faithful discharge of the duties of his office as treasurer, and that he should "well and truly pay over to the person or persons entitled thereto, upon the proper order therefor, all sums of money which shall come into his hands as treasurer of said district, and shall, at the expiration of his term of office, pay over to his successor in office all moneys remaining in his hands as such treasurer." During the year beginning in July, 1894, he received, as treasurer, the sum of $351.92, and paid out the sum of $270.93, without any order from the clerk or director for such payment. In defense of such payments, it was shown that on August 6, 1894, the defendant *Baier*, as treasurer, and one Hermann, who was director of the school, served upon William Peters, the clerk of the district, the following notice:

"Mr. Williams Peters,

"Dear Sir: The school board will meet August 7th, at seven o'clock p. m., to hire and make a contract for a teacher.

[Signed] "AUGUST BAIER.

"FRED HERMANN."

Peters did not attend this meeting, but *Baier* and Hermann met and attempted to make a contract with Mary Lamb to teach the school for seven months. There is no proof which shows that Mary Lamb had a certificate to teach at the time of the contract, but she procured one on the 4th of September following. She commenced to teach the school

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in October, and did actually teach the same for seven months; but no meeting of the district board was held during the year, nor were any orders drawn by the clerk or director during the year. The defendant *Baier*, however, paid the salary of the teacher for seven months, at $34 per month, and also paid all other incidental expenses of the school at that time, without any orders. At the annual school district meeting held on the 1st of July, 1895, the treasurer's report was rejected and disallowed, for the reason that he presented no vouchers. At a special school meeting held on the 31st of August, 1895, it appears that the treasurer's report was read, and on motion adopted.

Upon these facts, both parties moved that the court direct a verdict. The court overruled the plaintiff's motion, and granted the defendants'; and from judgment dismissing the complaint the plaintiff appeals.

For the appellant there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee*.

For the respondents there was a brief by *C. L. Hood* and *Wm. S. Burroughs*, and oral argument by *Mr. Hood*.

WINSLOW, J. The statutes governing the duties of school district officers are very specific, and wisely so. The district board is composed of the director, treasurer, and clerk. Meetings of the board may be called by any two members by serving on the other member a written notice of the time *and place* of the meeting twenty-four hours before the meeting. No act of the board *is valid* unless voted at a meeting of the board. R. S. sec. 432. The *board* shall contract with *duly qualified* teachers. No contract with any person not holding a diploma or certificate authorizing him to teach *shall be valid*. R. S. sec. 438. The duty of the clerk, among other things, is to draw orders on the treasurer for money in payment of the wages of duly qualified teachers who have been employed by the board, and have taught the school of

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the district; also, to draw orders for other legally authorized expenses. R. S. sec. 446. The duty of the director, among other things, is to countersign all orders legally drawn by the clerk upon the treasurer, and to prosecute the treasurer's bond in case of breach. R. S. sec. 442. The duty of the treasurer, among other things, is to receive and hold all the school moneys of the district, and to "pay all money received by him on the *order of the clerk* countersigned by the director, and *not otherwise*." R. S. sec. 444.

In the present case the meeting of August 7 was not legally called, because the notice did not fix the place of meeting. There were but two members of the board present, and the other member of the board had not been notified of the meeting, as the law requires. Hence it was not a legal meeting, and the contract with Miss Lamb, attempted to be authorized at the supposed meeting, was void. Not only was the contract with Miss Lamb void, but the clerk never issued a warrant authorizing the treasurer to pay her any salary. The treasurer's duty is fixed by the statute. He is to pay out money *only* upon the order of the clerk, properly countersigned. It is not his business to speculate upon and decide what claims against the district are equitable or just. There is one certain guide which he has to go by, and which will protect him, and that is the rule of the statute. He is not vested with any discretion as to the payment of a claim when the claimant possesses no order signed by the clerk and countersigned by the director. In the present case, not only was there no order, but there was no valid contract ever made with the teacher which would justify the issuance of an order. But it is enough that there was no order. The result may be hard in the present case, but the rule is a salutary one. The treasurer must account for the moneys which he has paid out without warrant of law.

By the Court.— Judgment reversed, and action remanded for a new trial.

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NUTTING, Respondent, vs. MINNESOTA FIRE INSURANCE COMPANY, Appellant.

November 18 — December 10, 1897.

Insurance: Delivery of policy: Parol evidence.

1. An insurance agent, on handing a policy to the broker who was acting for the insured, said that he would like to keep it a few days until he knew whether the insurer would carry the risk, and then took it away and retained it, and did not notify the broker of the insurer's refusal to carry the risk. *Held*, that there was no completed contract of insurance, because the policy was never delivered.
2. Parol evidence is admissible to show that a writing, which is in form a complete contract, of which there has been a manual tradition, was not to and did not become a binding contract until the performance or occurrence of some condition precedent resting in parol.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

This action was brought for the recovery of a loss sustained by the plaintiff on his hotel building and barn at Midway, Wisconsin, under a policy alleged to have been issued by the defendant company to him, set out in the complaint; and the question vital to the case is whether the alleged policy ever became an operative and binding contract, the defendant denying that it was ever in force.

Harrison Griswold testified on behalf of the plaintiff, in substance, that he was a member of the firm of Haloway & Griswold, in the insurance business, about three years; and that the firm received from the plaintiff a verbal application about September 26, 1895, for some insurance; and that he told plaintiff they could not insure the property, but that he thought Magill & Burke would carry it, as they had carried it one year before. He applied for $1,000 insurance, and left with them the money to pay for it. Before October 1st,

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witness met Mr. Burke on the sidewalk, and talked about the risk in question. "He asked me if they wanted it renewed, and I said, 'Yes.' He said he could not put it in the same company that he had carried it in the year before, but would put it in another company. I said that would be all right. The next time I saw him, he brought the policy over to my office, and laid it on the table. I took down the number, in my register, of the policy, and then he said he would like to keep it a few days, because *he did not know whether the company would carry it or not*, as other companies had refused to carry country property. So he took the policy home with him, but was to let me know whether the company carried it or not." Witness did not think he informed him at that time that the policy had been paid for. They "had been dealing with the firm of Magill & Burke, so that charges were made against our firm for policies issued at our request." They had carried this same property before. "I didn't hear anything about that policy till after the fire. I then went over to Mr. Burke's office to see about the policy. I was informed there that the policy had been canceled. I had never heard anything of the cancellation of that policy prior to that time. The premium that I received from the plaintiff was in my possession all the time. I never paid it to Magill & Burke. Met Burke on the street a number of times after he took the policy away. I never asked him anything about it. I never offered to pay Magill & Burke any premium on this policy. I don't think they ever presented a bill. My idea was that he had sent the policy up to *Mr. Nutting*. He didn't deliver the policy to me. I know positively that that policy was never left in my office for any length of time. It was not in my office from the 1st to the 10th of October. It was like this: He brought the policy in to me. I took the number down as I have it in this book, and he said he would like to keep it

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two, three, or four days, to see whether the company would carry it or not. If they didn't, he would let me know. That is customary. I understood he would bring the policy back to me."

At the close of the testimony the defendant moved for a nonsuit upon the ground that the testimony showed that the policy was never delivered to take effect. This motion was denied.

James C. Moody, secretary of the defendant company, testified that a book which he produced showed a daily report from Magill & Burke on the property owned by *Mr. Nutting*. The entry is as follows: "The number is 54,557, void. *C. W. Nutting*, dwelling and barn, Midway, Wis., Oct. 5, 1895, one year 1896,—$1,000. I cannot state from that when that daily report was received at our office. The first record was placed here when the daily report came in, and the second one, marked void, and erased, was on account of the policy having come in as void,—not in force. I judge that the policy was marked void after the policy came back to us,—from the record."

Mr. Burke, of the firm of Magill & Burke, testified to the request of Mr. Griswold to renew the insurance on the property. He told him that they could not, as they were not agents; that they had one company writing outside business (the *Minnesota Fire*), but it was questionable whether they would take the hotel risk at Midway, and he said that he would submit the question to them, write the policy, and send in a report right away, so they would have time, "*before the policy goes into effect, to either accept or decline* the risk." He said that was all right. This was October 1st. Their policy expired on the 5th. "We wrote the report and sent it off on the 1st. The record of the compact office shows our report went through on the 1st. I got a reply on the 3d as follows:

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'Minneapolis, Oct. 3, 1895.

'Messrs. H. B. Magill & Burke,

'La Crosse, Wis.

'Dear Sirs: 54,557, *C. W. Nutting.* We are in receipt of above daily report, covering a thousand dollars in Midway, Wis. We beg to say we are not writing outside business in your section in towns of less than 300 population. We therefore have to ask you to relieve us of liability under above policy. Send same to us at your earliest convenience.

'Very truly yours,

'JAMES C. MOODY,

'Sec'y & Manager.'"

Further testifying, the witness Burke said: "At the time we sent off the report, we wrote the policy on the 1st day of October, and I delivered it in person to Mr. Griswold on that day. Told him, when I handed it to him, pretty much what I told him when he gave us the order for the insurance,— that it was doubtful whether the company would carry it, and I would like to have him hold the policy, and not deliver it to *Nutting*, till we got word from the company, one way or the other, about it. He said he would do so. Upon receipt of this letter, as soon as I got through with my mail, on the same day, I took this letter, and started over to Mr. Griswold's office, for the purpose of telling him what the company had written. I met Mr. Griswold on the corner between our office and the tobacco store, showed him the letter, and asked for the return of the policy. He remarked to me: 'I suppose we are entitled to five days, under the terms of the policy.' I said: 'Inasmuch as this policy has not taken effect, I guess you are not entitled to any consideration of that kind.' He said he would send the policy over right away. We did not get policy immediately. During the next four days I went over to his office three or four times before we got in. He was off on insurance business. I met him two or three times on the street, and told him we would like to get the policy. On the 9th, not having re-

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ceived the policy, I wrote the company the letter, a copy of which we have here. I got the policy on the 10th. Mr. Griswold brought it into my office as I stood at my desk. I turned it over to our policy clerk, to be returned through the usual channel, which was through our compact office, and it was returned in that way. When the policy was written, we charged it up to Haloway & Griswold; and, when it was brought back, we credited the policy back."

On behalf of the defendant a letter written by Magill & Burke to the insurance company October 9, 1895, was put in evidence as follows:

"Oct. 9th, 1895.

"Jas. G. Moody,

"Mgr. of Minnesota Fire Ins. Co.,

"Minneapolis, Minn.

"Dear Sir: Referring to your favor of Oct. 3rd, ordering cancellation of 54,557,— *C. W. Nutting*,— we have given formal notification of the cancellation of this policy, and will doubtless receive the policy within a day or so.

"Yours truly,

"H. B. Magill & Burke."

Mr. Griswold, recalled, testified that Mr. Burke never showed him the letter of the defendant company, or any other pertaining to the policy; that he never notified him in any way that the policy had been canceled, or that it was not to go into effect; that he did not know anything about this until after the fire; that he never saw the policy after he took it away; and that he did not bring it back to Burke's office on the 10th of October.

The defendant's counsel asked the court to direct a verdict for the defendant, which request was refused. The case was submitted to the jury, and the plaintiff had a verdict and judgment for $862.15, from which the defendant appealed.

H. W. Chynoweth, for the appellant.

Ray S. Reid, for the respondent.

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PINNEY, J. The undisputed evidence shows that the policy of insurance upon which the action is founded was never delivered by the defendant as a completed contract, and that no contract of insurance was concluded between the parties. It is evident that there was no meeting of their minds, in the legal sense of the term. The evidence of Griswold, the plaintiff's agent, who was seeking to perfect a policy of insurance for him for $1,000 on the property in question, and for one year, is quite decisive: The policy was written and was handed to him by Burke, of the firm of Magill & Burke, agents for the defendant. "He [Burke] said he would like to keep it a few days, because he did not know whether the company would carry it or not. So he took the policy home with him, but was to let me [Griswold] know if the company would carry it or not." He met Mr. Burke on the street quite a number of times after he took the policy away. "I never asked him about it. Burke did not deliver the policy to me [Griswold]. My idea was that he [Burke] had sent the policy to *Nutting* [the plaintiff], and that, if the company did not carry the policy, that he [Burke] would let me know." Burke testified that the policy was written October 1st, and delivered by him in person to Griswold on that day, and he told Griswold when he handed him the policy pretty much what he told him "when he gave us the order for the insurance,— that it was doubtful whether the company would carry it, and I would like to have him hold the policy, and not deliver it to *Nutting*, till he got word from the company, one way or the other, about it. He said he would do so." Burke testified that he was to submit the question to them, write the policy, and send in a report right away, so they "would have time before the policy goes into effect to either accept or decline the risk." He (Griswold) said that was all right. Griswold testified that Burke said that, if the company did not carry the risk, he would let him know.

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Although the policy was placed in the physical custody of Griswold, and he had a momentary manual possession of it, yet this was not for the purpose of completed delivery, or to make the policy presently operative, but quite the reverse. This result was what both Griswold and Burke sought to avoid, unless and until it could be ascertained whether the defendant company would assent to and carry the risk. Accordingly, Griswold kept the money put into his hands to pay the premium, and Burke took the policy home with him. The defendant had not yet acquired any right to the money of the plaintiff for the policy; for it was to be operative upon a condition that did not occur, namely, that the defendant would accept the risk. The plaintiff's agent, Griswold, should have pressed the matter to an early and decisive conclusion, obtaining a consent to, or refusal of, the risk. The failure of Burke to notify Griswold of the defendant's refusal to carry it would not place it under any contract obligation to the plaintiff. Parol evidence is admissible to show that a writing which is in form a complete contract, of which there has been a manual tradition, was not to and did not become a binding contract until the performance or occurrence of some condition precedent resting in parol. *Reynolds v. Robinson*, 110 N. Y. 654; *Juilliard v. Chaffee*, 92 N. Y. 529, 535; *Benton v. Martin*, 52 N. Y. 570; *Brewers' G. Ins. Co. v. Burger*, 10 Hun, 56; *Ware v. Allen*, 128 U. S. 590, 595; *Burke v. Dulaney*, 153 U. S. 228; *Adams v. Morgan*, 150 Mass. 143; *Faunce v. State Ins. Co.* 101 Mass. 279.

The undisputed evidence shows clearly that there was never any delivery of the policy in suit, and that there was not a completed contract of insurance between the parties. The circuit court erred, therefore, in denying the defendant's motion for a nonsuit, and in refusing to direct a verdict for the defendant.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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PALMER and another, Appellants, vs. THE CITY LIVERY COMPANY, Respondent.

November 18 — December 10, 1897.

Landlord and tenant: Forfeiture of lease: Waiver.

A lessor, upon default in the payment of rent, brought summary proceedings to recover possession of the premises. From a judgment awarding such possession to him the lessee appealed, and gave an undertaking, under sec. 3368, R. S., to stay proceedings during the pendency of the appeal, conditioned to pay rent during such pendency. *Held*, that the lessor did not, by accepting the rent secured by such undertaking, waive his right to insist on the forfeiture of the lease for nonpayment of previous rent.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

The plaintiffs are the owners of a livery barn in the city of La Crosse. The defendant occupied the barn under a lease. Rent became in arrear. The plaintiffs made demand for its payment or the surrender of the premises. The defendant neither paid the rent nor surrendered the premises. The plaintiffs brought suit for the possession, and obtained judgment for possession of the premises. The defendant appealed to the circuit court, and gave the undertaking required by R. S. sec. 3368, to stay proceedings during the pendency of the appeal. This undertaking was conditioned, among other things, to pay rent during the pendency of the appeal. Three months' rent of the premises was paid, for the time during the pendency of the appeal, and received by the plaintiffs. Afterwards, on the trial, the receipt of this rent was urged as a waiver of the previous breach in the nonpayment of rent. The court rendered judgment for the defendant, dismissing the complaint. From this judgment the plaintiffs appeal.

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For the appellants there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee*.

C. L. Hood, for the respondent.

NEWMAN, J. The question is whether the receipt of the rent by the plaintiffs was, in the circumstances, a waiver of their right to insist on the forfeiture of the lease. It is the settled law, no doubt, that the landlord who, with knowledge of the breach of the condition of a lease for which he has a right of re-entry, receives rent which accrues subsequently, waives the breach, and cannot afterwards insist on the forfeiture. *Gomber v. Hackett*, 6 Wis. 323; *Conger v. Duryee*, 90 N. Y. 594. This is on the ground that the landlord has an election. He may choose whether he will declare the lease at an end, and re-enter at once, or whether he will overlook the breach, and let the lease remain in force. Of course, he cannot do both, for the two courses lead in opposite directions; and, because the taking of rent which accrues subsequently to the breach is incompatible with a rescission of the lease, it is held that the acceptance of rent, under such circumstances, is clear evidence of an election to have the lease continue in force. The rule, being founded on the exercise of his option by the landlord, can have no place in a situation where no option is afforded him.

The only question here is whether the rule of election applies, in the facts of this case. Practically the question is whether the plaintiffs were in a situation in which they had a choice. If they had no choice they could be bound by no election. The situation is clear. There was a breach of a condition of the lease which gave the plaintiffs the right of re-entry. They elected to terminate the lease, gave the proper notice, and brought their proper action. They obtained judgment for restitution. The defendant appealed, and gave its undertaking. This undertaking bound it to pay the rent, and gave it the right to remain in possession

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during the pendency of the appeal. The plaintiffs had no option in the matter. It is clear that from that time the occupation of the defendant was against the consent of the plaintiffs. It was not referable to the lease, but to the situation created by the appeal and undertaking, and could be no proper evidence that the plaintiffs had elected to waive their right to terminate the lease. So, the payment and receipt of the rent are referable to the situation, and not to the plaintiffs' choice. The law does not intend the absurd conclusion that the plaintiffs must forego all rents during the pendency of the appeal, under penalty of forfeiting all their rights in the action. It has been at too much pains to secure such rents to them for that conclusion. That a party abides by a situation in which the law places him is no evidence that the situation is of his choice, nor binding upon him as an election.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

POWELL, Appellant, vs. ASHLAND IRON & STEEL COMPANY, Respondent.

November 18—December 10, 1897.

Appeal: Court and jury: Master and servant: Assumption of risk: Contributory negligence.

1. Unless the proof of contributory negligence is so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion, the question of such negligence must be determined by the jury.
2. A decision of the trial court that the plaintiff in an action for a personal injury by negligence was, as a matter of law, guilty of contributory negligence, must be affirmed on appeal, unless it is clearly erroneous.
3. Evidence showing, among other things, that there were two elevator shafts, side by side, in a dimly lighted place in a manufacturing

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plant, which had nothing to prevent approach to them and were dangerous, one elevator going up while the other was coming down, and that an employee who was perfectly familiar with all the facts and with the danger of exposing himself within the shafts, on being requested to place the dinner pail of the man at the top upon the elevator undertook to do so and was injured by the descending elevator, is *held* to sustain a finding by the trial court that he had assumed the risk and was, as a matter of law, guilty of contributory negligence.

4. It is a general rule that, where unusual dangers are known to the employee and he voluntarily assumes them, if he is thereby injured he cannot recover, because of his contributory fault, even though the master, at the same time, is guilty of negligence which, without such assumption of risk, would have rendered him liable.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Action to recover damages for personal injuries. Plaintiff was a man twenty-two years of age, and of average intelligence so far as shown by the pleadings and evidence. He was in the employ of defendant in operating an iron-manufacturing plant. While so employed he stepped into the lower opening of an elevator shaft, or leaned into such opening, for the purpose of placing a workman's dinner pail on the elevator to send it to the top landing where such workman was employed. While in the act of so doing the elevator descended and struck him, causing the injury complained of. The jury rendered a special verdict, finding all the issues in plaintiff's favor, and assessing his damages at $3,000. The third finding was to the effect that plaintiff was not guilty of contributory negligence. The court, on motion of the defendant, changed such finding to one that plaintiff was guilty of such negligence, which was excepted to by the plaintiff. Judgment was thereupon rendered in defendant's favor of no cause of action, and the plaintiff appealed.

For the appellant there was a brief by *Cate, Sanborn, Lamoreux & Park*, with *D. F. O'Keefe*, of counsel, and oral

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argument by *B. B. Park.* Among other things, they argued that the defendant, as master, not having provided any railing, guard, or fence for the elevators, as required by sec. 1635*f*, S. & B. Ann. Stats., was liable for the injury to his employee. *Taylor v. Carew Mfg. Co.* 143 Mass. 470; *Willy v. Mulledy*, 78 N. Y. 310. The question of plaintiff's contributory negligence was for the jury. It was not so clear as to justify the court in ignoring the right of the jury and assuming to pass upon it. *Kaples v. Orth*, 61 Wis. 531; *Peterson v. Sherry L. Co.* 90 id. 83; *Townley v. C., M. & St. P. R. Co.* 53 id. 633; *Salladay v. Dodgeville*, 85 id. 318; *Valin v. M. & N. R. Co.* 82 id. 1; *Peoples' Bank v. Morgolofski*, 75 Md. 432; *Thompson v. Edward P. Allis Co.* 89 Wis. 529; *Jung v. Stevens Point*, 74 id. 547; *Strong v. Stevens Point*, 62 id. 265; *Gates v. Hughes*, 44 id. 332; *Cumberland V. R. Co. v. Maugans*, 61 Md. 53. The plaintiff was not negligent. He acted upon proofs such as would satisfy an ordinarily intelligent and prudent person of facts which rendered it safe for him to act as he did. Beach, Contrib. Neg. (1st ed.), 41; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519; *Engel v. Smith*, 82 Mich. 1; *Wheeler v. Westport*, 30 Wis. 392; *Cuthbert v. Appleton*, 24 id. 383; *Weisenberg v. Appleton*, 26 id. 56; *Barstow v. Berlin*, 34 id. 357; *Ewen v. C. & N. W. R. Co.* 38 id. 613.

For the respondent there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. H. Merrill.*

MARSHALL, J. The sole question on this appeal is, Does the evidence conclusively show contributory negligence on plaintiff's part? Otherwise that branch of the case was exclusively for the jury, and the trial court erred in changing the finding in that regard and in rendering judgment for the defendant.

The general rule is too firmly established and well understood to require discussion here, to the effect that unless the

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proof of contributory negligence is so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion, or, as it is sometimes said, so clear and conclusive as not to admit, reasonably, of any opposing inference in unbiased and unprejudiced minds, the proper inference to be drawn must be determined by the jury. *Duame v. C. & N. W. R. Co.* 72 Wis. 523; *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375; *Steinhofel v. C., M. & St. P. R. Co.* 92 Wis. 123; *Seefeld v. C., M. & St. P. R. Co.* 70 Wis. 216; *Valin v. M. & N. R. Co.* 82 Wis. 1; *Langhoff v. M. & P. du C. R. Co.* 19 Wis. 489; *Nelson v. C., M. & St. P. R. Co.* 60 Wis. 320.

The learned circuit judge who presided at the trial, in deciding the question under consideration, undoubtedly had clearly in mind the familiar principle to which we have referred, and, testing the undisputed facts on the evidence by such rule, concluded that there could be but one reasonable inference therefrom; that such inference was unmistakable; and therefore that the question was one of law which it was his duty to decide; and he held accordingly. A decision thus rendered must be affirmed on appeal unless it clearly appears that it was erroneous. That weight, at least, should be given to decisions of trial judges, even on questions of the kind under consideration. It is the uniform rule that their determination of questions of fact cannot be disturbed unless against the clear preponderance of the evidence. The reasons for that rule do not apply as strongly to decisions as to whether the inferences to be drawn from undisputed facts are all one way, but the opportunities which a trial judge has for determining such questions are superior to those possessed by the appellate court, and on that ground are entitled to considerable weight, and, where the question is doubtful, to controlling weight.

In the light of the foregoing we have carefully considered the evidence in the record bearing on the question presented.

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It is undisputed that there were two elevator shafts side by side, reaching from about ten inches below the level of the lower floor of the manufacturing plant to a height of about sixty-five feet; that there was an opening in each such shaft at the lower floor, about nine by ten feet; that the elevators were operated by steam power to carry charcoal and iron ore to the top of the furnace, where it was handled by workmen called top-fillers; that the elevators were operated in such a way that when one went up the other came down, and when one was at the top of the shaft the other was in the pit, with the platform at a level with the lower floor; that an ore crusher in the vicinity made so much noise as to render the working of the elevator machinery, ordinarily, not perceptible in the vicinity of the lower openings into the shafts; that the light in the room next to such openings was very poor, so that whether the elevators were up or down could not readily be seen without artificial light, especially by a person on first going in from the outside of the building; that it was usual to have a light there for the use of the workmen who filled the carriers with coal and ore and rolled them onto the elevator platforms to be hoisted; that there was no protection at the openings to prevent a person from walking into the shafts, and nothing to indicate whether an elevator was up or down except as its location could be discerned by looking in at the opening; that it was customary to send to the top-filler his dinner pail by placing it on the elevator platform; that plaintiff was requested to do that on the occasion in question; that he was perfectly familiar with all the facts before detailed, and knew that it was dangerous to expose his body in an elevator shaft without first being sure that the elevator was down or not about to descend; that all the risks were as well known to him as to the defendant; that under these circumstances he approached the elevator to place the filler's dinner pail on the elevator platform. Whether he walked into the

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opening and was then struck by the descending elevator, or in attempting to place the pail on the platform leaned over sufficiently to place his body in the path of the descending elevator, is not certain; but it is undisputed that he looked into one of the openings and saw that the platform was not down; that he then looked into the other, and supposing by appearances that the platform there was down, either walked into the shaft or leaned over into it, when the elevator descended upon him causing the injuries complained of.

The general rule is that, where unusual dangers are known to the employee and he voluntarily assumes them, if he is thereby injured he cannot recover, on account of his contributory fault, even if the master, at the same time, is guilty of negligence which, without such assumption of risk, would have rendered him liable. *Hazen v. West Superior L. Co.* 91 Wis. 208; *Jones v. Sutherland*, 91 Wis. 587; *Jung v. Stevens Point*, 74 Wis. 547; *Naylor v. C. & N. W. R. Co.* 53 Wis. 661. This rule is based on the theory that when a person engages in the employment of another, he is supposed to do so in view of all the usual risks incident to the business, and also all unusual hazards attending such business as conducted by the master, if such hazards are known to him. This, as said in effect by a very learned author, eminent as such and as a judge of one of the highest courts, is only a part of the contract which public policy permits master and servant to make, inasmuch as an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business, but would be an encouragement to the servant to omit that diligence for his own safety which is a far higher security than any recovery against the master for damages could ever afford.

The foregoing, in the judgment of the trial court, governs this case in defendant's favor, and the record comes far short of showing clearly that the decision is wrong. While it

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goes on the doctrine of assumed risks, the subject was covered by the third finding. True, that referred to contributory negligence, but, as said before, it includes assumption of the risk. There are courts, and text writers as well, that confidently claim a distinction between the two, some going so far as to hold that "assumption of risk" is so essentially a matter of special contract that to constitute a defense it must be pleaded specially. It is considered here, notwithstanding authority to the contrary, that no necessary distinction exists between the two. Such distinctions are indulged in far too much and lead only to confusion and uncertainty in a most important branch of jurisprudence. Assumption of risk, in the sense of those ordinary dangers incident to an employment as ordinarily carried on, of course has nothing to do with contributory negligence, for there being no negligence on the part of the employer as to such risks, obviously there can be no contributory negligence in the sense of concurring fault. But the term "assumption of the risk," as used to designate a defense against the employer's fault, covers the subject of one's voluntarily subjecting himself to danger not ordinarily incident to the employment in which he is engaged, but which nevertheless exists because of the way the employer sees fit to conduct his business. Tested by the standard of ordinary care, the presence of such unusual danger constitutes a wrong on the part of the employer, but one the legal consequences of which the servant may contract to waive, which he does by entering or continuing in the employment of the master with knowledge of its existence. In such a case it is immaterial that the danger might be guarded against by the employer, even if failure in that respect be a violation of some statutory requirement on the subject. The responsibilities which, by the rules of the common law, the servant must assume and discharge for his own safety, are not affected thereby unless the statute expressly so provides. What is

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here said is not strictly essential to a decision of this case, but it is considered proper in order to bring out clearly that the third finding on the subject of contributory negligence includes assumption of risk as a form of such negligence. It is by no means an open question in this court. The assumption of risks by an employee in any employment, not ordinarily incident thereto, has been uniformly treated by this court as but a form of contributory negligence. *Darcey v. Farmers' L. Co.* 87 Wis. 245; *Hazen v. West Superior L. Co.* 91 Wis. 208; *Peterson v. Sherry L. Co.* 90 Wis. 93.

It follows from the foregoing that the judgment appealed from must be affirmed.

By the Court.— Judgment affirmed.

FIRST NATIONAL BANK OF STEVENS POINT, Respondent, vs. CHAFEE, imp., Appellant.

November 19 — December 10, 1897.

Conveyances: Mortgages: Priority: Notice.

1. The actual and open possession of land by the vendee, under an unrecorded contract for its purchase, is constructive notice of his rights to one who, while he is so in possession, takes a mortgage of the land from the vendor, but it is not notice of the rights of one to whom the vendor has secretly assigned the contract.
2. A mere executory contract for the sale of land is not a "conveyance," within the meaning of secs. 2241, 2242, R. S., nor is the vendee a "purchaser" within the meaning of those sections, which make an unrecorded conveyance void as against a subsequent purchaser in good faith whose conveyance shall first be recorded.
3. In the absence of actual notice, or knowledge of facts sufficient to put him upon inquiry leading thereto, that the vendor in a contract for the sale of land has assigned such contract by a secret parol assignment, one who takes from the vendor a mortgage of the land will be protected against the assignee of the contract, and the claims of the latter will be held subject and subordinate to such mortgage.

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First National Bank of Stevens Point vs. Chafee.

APPEAL from a judgment of the circuit court for Waushara county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

This action was commenced March 30, 1896, by the assignee of a land contract against the vendee in possession, and also against the vendor and a subsequent mortgagee of the vendor, to foreclose the contract, and have the mortgage adjudged subject and subordinate to the plaintiff's claim. Issue being joined and trial had, the court found, as matters of fact, in effect, as follows: September 3, 1892, the defendant James F. Wiley, was the owner in fee of the 240 acres of land described. On that day Wiley and wife made and entered into a land contract for a deed with the defendant A. B. Mathews, by the terms of which Mathews agreed to pay, as the purchase price therefor, $4,000, according to the terms of ten promissory notes, of $400 each, dated on that day, and executed by A. B. Mathews, and payable to the order of James F. Wiley, with interest at six per cent. per annum, to become due, respectively, in one, two, three, four, five, six, seven, eight, nine, and ten years from that date. At the same time and as a part of the same agreement, another and further instrument was made, executed, and delivered by J. F. Wiley and A. B. Mathews, whereby Mathews was to put in twenty acres of potatoes each year (at least), and more if he wished, on his best land, of the best varieties, and to deliver all the good merchantable potatoes grown each year thereon to J. F. Wiley & Son's potato storehouse, in the fall of each year, at thirty cents per bushel, until enough should be delivered to pay $4,000 and interest, as per the ten notes mentioned, the first twenty acres to be planted in the spring of 1893. Immediately after the execution of the two land contracts mentioned, and the ten notes therein mentioned, A. B. Mathews and his wife, the defendant Julia Mathews, entered into the open and notorious possession of the real estate under his land contracts, and continued to occupy the

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same and remain in such possession until the trial of this action, claiming his interest in the real estate by virtue of the land contracts.

On September 30, 1892, J. F. Wiley & Son and J. F. Wiley were, and had been for six months, indebted to the plaintiff in the sum of $5,000. Such indebtedness was renewed on that day by two notes executed by J. F. Wiley & Son, and delivered to the plaintiff, and as collateral security for the payment of the two last-mentioned notes the said J. F. Wiley did, on September 30, 1892, as such owner and holder of the land contract and the ten notes mentioned therein, deliver to the plaintiff the ten promissory notes so signed by A. B. Mathews, as collateral security for the $5,000 represented by the two renewal notes so given on that day. At the time of such delivery, J. F. Wiley represented and stated to the plaintiff that the ten notes were secured by a mortgage of real estate or by a land contract. It was then and there agreed by and between the plaintiff and J. F. Wiley that the plaintiff would receive and hold the ten notes as such security, and the plaintiff had ever since held and still continued to hold the ten notes as such security, with the consent and approval of J. F. Wiley & Son and J. F. Wiley.

On July 16, 1894, the notes so executed September 30, 1892, were consolidated into one note of $5,000, with interest at eight per cent. per annum, signed by J. F. Wiley & Son, and was due in ninety days thereafter. The $5,000 note was renewed from time to time until October 3, 1895, on which date it was renewed for the last time, and the same was made payable ninety days from that date, with interest at eight per cent. per annum. No payment had ever been made on that note, except $100, paid January 13, 1896. Neither the land contract nor any assignment thereof was ever recorded in the register's office; and the plaintiff did not, at any time, inform Mathews that his notes were held by it, until March, 1896, and Mathews did not know until that date that

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the plaintiff held the notes, and he made payments thereon to J. F. Wiley in 1893, $474.45, and in 1894, $281.15, which moneys were retained by Wiley, with consent of the plaintiff, and the amount thereof was indorsed on said notes. There was due and to become due upon the ten notes and land contract $4,211.72 for principal and interest to December 28, 1896, of which sum there was then due for principal and interest $1,477.72.

On October 15, 1895, the defendant *Charles Chafee* loaned to J. F. Wiley $8,000, evidenced by four promissory notes, of $2,000 each, due in six, twelve, eighteen, and twenty-four months respectively; and as collateral security for the payment of said notes, J. F. Wiley and wife did, on the same day, duly make, execute, and acknowledge to *Charles Chafee* a real-estate mortgage upon the lands described, and other lands, which mortgage was duly recorded in the register's office, October 17, 1895.

On October 17, 1895, J. F. Wiley and wife executed, acknowledged, and delivered to *Charles Chafee* a second mortgage upon the lands in question, and other lands, to correct an error in the description of the first mortgage, and the same was recorded in said register's office, October 29, 1895. Both of said mortgages were executed without the knowledge or consent of A. B. Mathews and wife, or the consent of the plaintiff. At the time of giving such mortgage *Charles Chafee* had notice that A. B. Mathews was in the actual possession of the lands under said land contract, claiming an interest therein by virtue thereof. When Wiley was negotiating said loan of $8,000 from *Chafee*, the latter inquired of him whether or not there was any lien or incumbrance against the lands described, and he was informed by said Wiley that there was not, except that he had made a contract of sale with Mathews to be paid in potatoes, but that there had been practically nothing paid on the principal, and that Mathews wished to be relieved of the contract, so that

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it was practically unincumbered. *Chafee* had no actual knowledge or actual notice that the notes accompanying the land contract had ever been assigned to the plaintiff or any one else. Notice of the pendency of this action was duly filed in the register's office, April 23, 1896.

As conclusions of law, the court found, in effect, that the transfer of the ten notes to the plaintiff operated as an assignment of the land contract to the plaintiff, and that the plaintiff, by virtue thereof, could maintain this action to foreclose the same; that the plaintiff was a *bona fide* holder of the notes described in the land contract; that the mortgaged premises be sold in one body, and that it was for the interest of all the parties that the same should be so sold; that the defendant *Chafee* was chargeable with notice of the land contract and the contents thereof, and of the existence of the ten promissory notes therein described, and with notice that the plaintiff was in possession of said ten notes, and all of the rights of the plaintiff in the premises, under the facts as therein found to be true; that *Charles Chafee* was not an innocent mortgagee of the premises hereinbefore described; that his mortgages, and each of them, were subject and subordinate to the rights of the plaintiff in the premises, by virtue of the facts so found; that the defendants A. B. Mathews and wife were wholly in default; that the plaintiff was entitled to a judgment of strict foreclosure of the land contract, in accordance with such findings.

From the judgment entered thereon according to such findings, the defendant *Chafee* brings this appeal.

John Barnes, for the appellant.

For the respondent there was a brief by *Cate, Sanborn, Lamoreux & Park*, and oral argument by *B. B. Park*. They argued, *inter alia*, that the transfer of the vendee's notes to the plaintiff was a transfer of the contract by which they were secured. *Church v. Smith*, 39 Wis. 492. The mortgagee was chargeable with notice of all the facts about the

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contract which he might have learned from the vendee. *Mateskey v. Feldman*, 75 Wis. 103; *Williamson v. Brown*, 15 N. Y. 354, 362; *Brinkman v. Jones*, 44 Wis. 519; *Ely v. Wilcox*, 20 id. 524; *Wickes v. Lake*, 25 id. 71; *Denton v. White*, 26 id. 679; *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. Eq. 109; note on 159, 180, 187; 1 Story, Eq. Jur. § 410*a*; 2 Sugden, Vendors (8th Am. ed.), ch. 24, sec. 1, p. 513, and note (*a*); *Losey v. Simpson*, 11 N. J. Eq. 246. The vendee's possession was notice, not only of his rights, but of the rights of persons claiming under the vendor. *Coe v. Manseau*, 62 Wis. 81–87, 88; Wade, Notice, secs. 30, 65, 65*a*.

CASSODAY, C. J. Of course, the actual and open possession of the land by Mathews, as vendee under the unrecorded contract for the purchase of the same, as found by the court, was constructive notice to *Chafee* and the world as to what his rights and interest in the land were. *Meade v. Gilfoyle*, 64 Wis. 25; *Coe v. Manseau*, 62 Wis. 82; *Wickes v. Lake*, 25 Wis. 71; *Ely v. Wilcox*, 20 Wis. 523. But such constructive notice related primarily to the rights and interest of Mathews. Thus, it has been held that where the vendee, in such actual possession, has paid to the vendor the full amount of the purchase price for the land, then such vendee by such payment becomes the absolute equitable owner. *Honzik v. Delaglise*, 65 Wis. 499. In the case at bar the vendee had failed to keep up the interest, much less to reduce the principal. As Wiley informed *Chafee*, Mathews' interest was practically nothing. All of Mathews' payments had been made to Wiley personally, and Mathews did not know that Wiley had transferred his notes or the contract to the plaintiff until this action was commenced. There is no pretense that *Chafee* had any knowledge or reason for believing that such transfer had been made until long after he had loaned his money to Wiley and taken and recorded his mortgage. So far as *Chafee* was concerned,

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and so far as Mathews was concerned, such transfer from Wiley to the plaintiff was a secret. To hold that such possession of Mathews was a constructive notice to *Chafee* of the secret arrangement between Wiley and the plaintiff — unknown to both Mathews and *Chafee* — would be to defeat the very object of the registry statutes. It does not appear that the plaintiff held any formal assignment of the land contract from Wiley, much less that any such assignment was recorded.

The statute declares that "every *conveyance* of real estate within this state . . . which shall not be recorded as provided by law, shall be void as against any subsequent *purchaser* in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall first be recorded." R. S. sec. 2241. The statute also declares that "the term 'conveyance,' as so used, shall be construed to embrace every instrument in writing, by which any estate or interest in real estate is created, aliened, *mortgaged*, or assigned, or by which the title to any real estate may be affected in law *or equity*, except wills, leases for a term not exceeding three years, *and executory contracts for the sale or purchase of land;* and the term 'purchaser,' as so used, shall be construed to embrace every person to whom any estate or interest in real estate shall be conveyed for a valuable consideration, and also every assignee of a mortgage or lease, or other conditional estate." R. S. sec. 2242. From this last section it is apparent that a mere "executory contract for the sale or purchase of land" is not a "conveyance," within the meaning of sec. 2241, R. S., and that the vendee in such contract is not a "purchaser" within the meaning of that section. This was held by Judges DAVIS and HOPKINS in *Curts v. Cisna*, 7 Biss. 260. The ground of such decision is that such vendee must rely on the responsibility of his vendor. *Id.* But, as indicated, if the contract is so far executed that the vendee has entered into the open

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and notorious possession of the land contracted for, then he is protected by virtue of such possession. But the statute also provides that "every bond *or contract* for the sale or purchase of lands, or concerning any interest in lands, made in writing, under seal, attested by two witnesses, and acknowledged, may be recorded in the office of the register of deeds of the county where the lands lie." R. S. sec. 2238. The statute further provides that "every bond *or contract* mentioned in section 2238, when executed, acknowledged and recorded, as provided in said section, shall be notice to and take precedence of any subsequent purchaser, and shall operate as a lien upon the lands therein described, according to its import and meaning." R. S. sec. 2245. But the land contract was not recorded, and it does not appear that it was so executed as to be recordable. The term "conveyance," as used in sec. 2241, is construed by sec. 2242 to include a mortgage, and the word "purchaser," as therein used, is construed to include a mortgagee. Id.

In the absence of actual notice or knowledge of such facts as would put a prudent man upon inquiry which would lead to actual notice, *Chafee*, as such mortgagee, had the right to rely on Wiley's apparent record title in fee, subject, of course, to the rights and interest of Mathews in possession. *Chafee* was a *bona fide* purchaser as against the plaintiff. Had Wiley, at the time of transferring the ten notes made by Mathews to the plaintiff, also executed and delivered to the plaintiff a warranty deed of the premises and then failed to record the same, such deed would, under the statutes cited, have been void as against the mortgage from Wiley to *Chafee* so recorded in October, 1895. Since that would be so in respect to such warranty deed, it must, for a much stronger reason, be so with respect to the secret transfer from Wiley to the plaintiff, which did not rise to the dignity of a conveyance, and was not recorded nor recordable. It would be preposterous to hold that such secret parol transfer of the

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notes and land contract to the plaintiff was more potential than such unrecorded warranty deed would have been. We must hold that the plaintiff's claim upon, and interest in, the premises in question are subject and subordinate to *Chafee's* mortgage. *Lamont v. Stimson*, 5 Wis. 443; *Hoyt v. Jones*, 31 Wis. 389; *Mason v. Beach*, 55 Wis. 607.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in accordance with this opinion.

KENYON, Respondent, vs. CITY OF MONDOVI, Appellant.

November 19 — December 10, 1897.

Municipal corporations: Defective sidewalk: Contributory negligence: Special verdict: Instructions: Privileged communications: Damages.

1. Upon evidence showing among other things that, while plaintiff was walking in a snow storm which might well conceal a hummock of ice around a pump in the sidewalk, he slipped and fell thereon, his attention being for the moment diverted by being accosted by a friend, it is *held* that he was not guilty of contributory negligence, as a matter of law, in not seeing and avoiding such ice.
2. Communications to a physician of facts which it is necessary for him to know in order to treat a patient intelligently are privileged, and the privilege is that of the patient.
3. It is not error to refuse to submit questions for a special verdict, offered by a party, if those submitted fully cover all the issues in the case.
4. A refusal to give special instructions asked, is not error if, though correct in themselves, they are substantially given in the general charge.
5. An instruction, in an action for personal injuries, that if the jury "are satisfied from the evidence that the injury that the plaintiff suffered is permanent in its nature, and will continue to affect his health and physical condition in the future, . . . you should allow him, in addition, such sum as will reasonably compensate him for such pain and suffering and impairment of ability to earn

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a livelihood as he must suffer in the future," does not violate the rule that permanent disability must be found to be reasonably certain before such damages can be allowed.

6. An instruction which, standing alone, might mislead the jury is not error when so qualified as not to have that effect.

APPEAL from a judgment of the circuit court for Buffalo county: E. B. BUNDY, Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries suffered by the plaintiff by reason of a fall upon a sidewalk in the defendant city on the 21st of November, 1893. The fact that the plaintiff fell was not disputed, nor was it disputed that he suffered injuries thereby. A snowstorm was in progress at the time of the fall, and the plaintiff claimed that the fall was occasioned by slipping upon an accumulation of ice upon the sidewalk. It appears that there was a pump located in the sidewalk, between two and three feet from the outer edge thereof; and the plaintiff and his witnesses claim that there was a large accumulation of ice under the spout of this pump, a foot or more in depth, which extended out several feet from the outer edge of the pump, in a round and uneven form, and that it had been substantially in that condition for several days. The plaintiff claimed that as he approached the pump his attention was diverted by a friend passing by and speaking to him, and that from that fact, as well as the fact that it was snowing, he did not see the ice, and hence stepped upon it and fell. The defendant's evidence attempted to show that there was no ice about the pump, but that the plaintiff slipped upon the snow.

A special verdict was rendered, by which it was found, in answer to appropriate questions: (1) That the plaintiff fell in the vicinity of the pump; (2) that there was at that place an accumulation of ice on the sidewalk, (3) resulting from the freezing of drippings from the pump, (4) forming a dangerous defect in the sidewalk; (5) that the plaintiff was

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injured by means of slipping on such ice; (6) that the ice would not be apparent to a person walking on the sidewalk and exercising ordinary care; (7) that the officers of the city had no actual notice of the existence of such ice, (8) but that it had existed long enough for the officers to discover it and remove it, in the exercise of ordinary care; (9) that there was an incline of the walk, towards the street; (10) that the street gutter was lower than the sidewalk; (11) that the plaintiff could not have seen the ice, in the exercise of ordinary care, in time to avoid it; (12) that the plaintiff did not voluntarily attempt to pass over the walk when, in the exercise of ordinary care, he ought to have known it was dangerous; (13) that the ice was uneven and rounded in form; (14) that the plaintiff had no defect in his injured leg prior to his fall on the sidewalk; (15) that the defendant was guilty of want of ordinary care, which was the cause of the injury; (16) that the plaintiff was not guilty of the want of any ordinary care which contributed to his fall; (17) that the plaintiff's damages were $3,000.

From a judgment for the plaintiff on this verdict, the defendant appeals.

For the appellant there was a brief by *J. W. Whelan*, attorney, and *Austin & Fehr*, of counsel, and oral argument by *W. H. Austin*. They contended, *inter alia*, that the plaintiff was, as a matter of law, guilty of contributory negligence in not observing and avoiding the ice, which was in plain sight and visible from some distance. *Conneaut v. Naef*, 54 Ohio St. 529; *Butterfield v. Forrester*, 11 East, 60; *Whalen v. Citizens' Gas Light Co.* 151 N. Y. 73; *Weston v. Troy*, 139 id. 281; *Dubois v. Kingston*, 102 id. 219; *Beltz v. Yonkers*, 148 id. 67; *Davis v. California St. R. Co.* 105 Cal. 131; *Schaefler v. Sandusky*, 33 Ohio St. 246; *Bluffton v. McAfee*, 12 Ind. App. 490; *Hudon v. Little Falls*, 71 N. W. Rep. 678; *Quincy v. Barker*, 81 Ill. 300.

Plaintiff's attention was not diverted until he was in the

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act of falling. The rejection of the physician's testimony as to the condition of plaintiff's leg previous to the accident was erroneous. The statement to him in regard to it was not necessary to enable him to treat the injury caused by the accident. *Campau v. North*, 39 Mich. 607; *Edington v. Ætna L. Ins. Co.* 77 N. Y. 564; *Kansas City, Ft. S. & M. R. Co. v. Murray*, 55 Kan. 336; Jones, Ev. § 778.

S. G. Gilman and *C. W. Gilman*, for the respondent.

WINSLOW, J. 1. A motion for nonsuit was made in this case, and overruled, and error is assigned upon this ruling. Examination of the record satisfies us that the case was one for the jury. The plaintiff was walking along in a snowstorm which might well conceal the outlines of the hummock of ice, and his attention was at the time momentarily diverted by being accosted by a friend. Under such circumstances, we cannot say that the plaintiff was guilty of negligence, as matter of law, in not seeing and avoiding the ice. *Wheeler v. Westport*, 30 Wis. 392; *Simonds v. Baraboo*, 93 Wis. 40.

2. The physician who treated the plaintiff's injured leg was asked certain questions as to statements said to have been made to him by the patient as to the previous condition of the leg and the circumstances of his fall. These questions were objected to as privileged communications, and the objections were sustained. We understand from the record,— though it is somewhat confused,— that the doctor stated that all these facts were necessary for him to know in order to enable him to treat the case intelligently. This brings it within the provisions of sec. 4075, R. S., and makes it a privileged communication. This court has recently held that in such case the privilege is that of the patient. *Boyle v N. W. Mut. R. Asso.* 95 Wis. 312. Hence there was no error in excluding the evidence.

3. Error is assigned upon the failure to submit certain

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questions to the jury as a part of the special verdict. It is sufficient to say on this point that the special verdict fully covered all the issues in the case.

4. The court charged upon the question of damages as follows: "And if you are satisfied from the evidence that the injury that the plaintiff has suffered is permanent in its nature, and *will* continue to affect his health and physical condition in the future, and cause him pain and suffering in the future, you should allow him, in addition, such sum as will reasonably compensate him for such pain and suffering and impairment of ability to earn a livelihood as he must suffer in the future." It is claimed that this instruction was defective, in that it allowed the jury to find permanent damages upon supposition or conjecture, and that it violated the rule that permanent disability must be found to be reasonably certain before such damages can be allowed. We do not think the objection well taken. The court told the jury that, if they were "satisfied" from the evidence that the injury was permanent, they might assess damages for such pain and suffering and impairment of ability to earn a livelihood as he *must* suffer in the future. If a jury are *satisfied* of the existence of a fact, it would seem that they must be *reasonably certain* of it. We see no defect in the instruction, and we think there was sufficient evidence to base it on.

The court also charged that admissions of a party are sometimes rather unreliable and calculated to mislead, and need to be scrutinized with care. This is objected to as unwarranted. If it stood alone, it might be misleading; but it was followed by further remarks to the effect that admissions deliberately made and clearly proven are entitled to considerable weight, and may be entitled to a great deal of weight, and that the degree of weight was a question for the jury. Certainly, with these qualifications, there was no error here.

5. A number of instructions were asked and refused. It

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seems hardly necessary to insert them here. They were generally correct, and were generally, also, included in the charge of the court, in somewhat different form and wording, but sufficiently expressing the idea to be conveyed. Many verbal criticisms are made of the charge, but we have discovered nothing of sufficient consequence to justify reversal.

The case seems to have been fairly tried, and submitted without prejudicial error.

By the Court.— Judgment affirmed.

CRITES, Respondent, vs. CITY OF NEW RICHMOND, Appellant.

November 19 — December 10, 1897.

Municipal corporations: Injury from defective sidewalk: Negligence: Evidence: Court and jury: Instructions.

1. In an action against a city for personal injuries caused by a defect in a sidewalk, evidence that there was plainly visible in a very generally traveled sidewalk, at the place where the accident occurred, a hole large enough to admit a man's foot, and that it had existed there for about a year, is sufficient to sustain a verdict finding the city guilty of negligence.
2. The mere fact that the plaintiff in an action for such injury had previous knowledge of such defect,— frequently saw it and considered it to be dangerous,— does not establish contributory negligence on his part, as a matter of law. Though he knew of it, he was not bound at all times, by day or night, when passing over such walk to bear the defect in mind; and if an injury occurred when his attention was momentarily diverted by other matters, the question of contributory negligence was one for the jury to decide upon all the facts.
3. In all cases where the inference of contributory negligence or the absence of it is in doubt, giving the testimony the construction most favorable to the party charged therewith, the question is for the jury. In order to warrant a nonsuit, or an absolute direction to find for the defendant, on the ground of contributory negli-

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gence, the proof of such negligence must be clear and decisive, leaving no room for impartial and unbiased minds to arrive at any other conclusion.

4. Though contributory negligence may appear on the plaintiff's own showing, in an action for personal injuries, so as to render proof of it by the defendant unnecessary, yet an instruction that the burden of proof thereof is upon the defendant is not misleading, when the court adds that such negligence cannot be presumed in the absence of facts showing it or circumstances from which the inference can properly be drawn.

5. A surgical expert who testifies that the plaintiff's injury was a severe sprain, may properly testify as to the results which usually or even sometimes attend or follow such an injury. Such testimony, based on his knowledge or experience, cannot fairly be regarded as speculative or conjectural.

APPEAL from a judgment of the circuit court for St. Croix county: E. B. BUNDY, Circuit Judge. *Affirmed.*

This was an action brought to recover damages which the plaintiff claims to have sustained in consequence of a personal injury received by him while traveling on a sidewalk in the defendant city, on and along the east side of Arch street, which, it was alleged, was defective, insufficient, and in want of repair, and which the defendant negligently and knowingly suffered and permitted for a long time previously to be and remain in such defective and insufficient condition. The defendant alleged that the plaintiff's injury was caused by his own fault and negligence.

On the trial before a jury, it appeared, in substance, that the street and sidewalk in question were very generally traveled and used, and the sidewalk was on the most usual and direct route from the plaintiff's home to the business places in the city. The walk was five feet wide, and the planks, about sixteen feet long, were laid north and south, and varied in width from four to eight and ten inches. They were full of knot holes and had many sides, and, where the plaintiff was injured, there was an incline or grade in the walk for about four rods, of about two and one half feet.

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He was going up the incline at the time on his way home, walking along, "not just thinking," and his acquaintance, Mr. Heffron, was coming down on the opposite side of the street, going to his work, and the plaintiff spoke to him, and said, "What's your hurry?" and he replied, "I am in a hurry to go down to the shop;" and just then the plaintiff stepped into a hole in the walk on the side of a plank large enough to admit his foot, and his ankle was turned in the hole, causing the injury complained of. There was a hole there, and a broken plank, and there was a knot across the plank about sixteen or eighteen inches from the end of it, and it broke right down; and he stepped on the side of the other plank, and turned his ankle right down, and fell against the fence. The break in the plank was about eight inches wide. It was broken clear off, about sixteen or eighteen inches from the end, and about two or three feet from a sleeper to the long end of the broken plank. The depression or hole was six or seven inches deep at the deepest place. When the plank broke down it bound on top, so that it did not rise back again.

The plaintiff testified that he first saw the hole over a year before the injury, and had "avoided it after that every time I thought of it, and I would try to go over on one side or the other; I thought it was a dangerous place, that ought to be avoided;" that he noticed it pretty nearly every time he traveled up and down the street, which was several times a day,— two or three times a day,— and he had traveled it by night frequently; that there was a sidewalk on the other side of the street. He further testified that he was not at the time looking where he stepped, and was looking at Mr. Heffron, on the other side of the street; might have taken eight or ten steps, or fifteen, after speaking with him, and kept walking along at an ordinary gait. Other evidence was given descriptive of the condition of the walk and hole, and tending to show that the mayor and aldermen of the defendant city had notice of its existence.

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Dr. Wade was called, and testified to the treatment he had given the plaintiff's ankle for the injury; that it was a sprained ankle; that sprains are where two bones come together to form a joint, and one bone is forced from its natural position with the other, and the ligaments are either ruptured or badly stretched; that he found the ankle swollen, and the plaintiff was suffering a good deal; that he was confined to the house, where he saw him a number of times, and was afterwards put on crutches; that from what he observed and learned of the case, from his first consultation, and from objective symptoms, it was a severe sprain, the usual consequence of which is that the member is usually weakened from the rupture, and the ligaments are strained, so that it leaves the joint lax, and makes it weaker; that the limb at the present time was smaller than the other; still had lameness in it. In answer to questions propounded by the plaintiff's counsel as to whether the ligaments sometimes became torn off or stretched so that they never resumed a normal condition, he answered, against the objection of the defendant, in the affirmative; also, to a similar question, that "in a severe sprain the ligaments *sometimes* tear off pieces of the bone of the joint, and that *sometimes* a sprain may be more serious than a fracture,— that is, the injury, the sprain, may couple with it, or in addition to the sprain you have a fracture, which, of course, makes it worse than a simple fracture;" that the weakened condition of the limb remains usually for a considerable length of time; that the joint was liable to be, and would be, weak for quite a long time, probably two or three years, and would afterwards be more liable to injury than a healthy joint, and might trouble the plaintiff, especially in stormy weather.

After the plaintiff had rested, the defendant moved for a nonsuit on the ground that it appeared from the evidence that the plaintiff was guilty of negligence which contributed to the injury. The motion was denied. After the conclusion of the testimony, counsel for the defendant requested

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the court to direct a verdict in its favor on the ground that there was no negligence on the part of the defendant, and that the plaintiff's injury was caused by his own negligence; but the motion was denied.

The court charged the jury, among other things, "that the depression or defect in the walk claimed appeared to be open and visible, and the plaintiff stepped into it in broad daylight, and might have seen it if he had looked; but that a person is not necessarily to be held guilty of negligence because he does not every instant keep his eyes on the walk before him, and keep in his mind every instant the fact that there is a dangerous defect in the walk over which he is passing. If his mind and attention and eyes are for a moment diverted to some object, and he removes his eyes from the walk, and, while so diverted, he walks into a hole which he might and would have seen had he been looking, it does not necessarily follow from this fact that he was negligent. He may or may not be negligent, according to the facts surrounding the case; and this is a question of fact for you to determine,— whether or not the plaintiff was negligent in this case." "The burden of proving contributory negligence is upon the defendant. It is not to be presumed in the absence of facts and circumstances from which an inference that the plaintiff was guilty of it can be properly drawn."

The jury gave a verdict for the plaintiff for $500, and a motion for a new trial on the ground of the rulings above set forth was denied, and the plaintiff had judgment, from which the defendant appealed.

For the appellant there was a brief by *W. F. McNally* and *S. N. Hawkins*, and oral argument by *Mr. McNally*.

For the respondent the cause was submitted on the brief of *Smith & Oakes*.

PINNEY, J. 1. The question whether the defendant city had been guilty of negligence in not repairing and keeping

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the sidewalk in question in safe and proper condition, which was the proximate cause of the plaintiff's injury, was submitted to the jury under proper instructions, and the evidence was clearly sufficient in this respect to sustain the verdict.

The mere fact that the plaintiff had previous knowledge of the defect in the sidewalk, and was familiar with it, and considered it dangerous, does not establish contributory negligence as a matter of law. *Salzer v. Milwaukee*, 97 Wis. 471; *Simonds v. Baraboo*, 93 Wis. 40. The defect was not one that could be regarded as imminently dangerous, and, as held in *Wheeler v. Westport*, 30 Wis. 392, and *Cuthbert v. Appleton*, 24 Wis. 383, the plaintiff was not bound at all times, by day or by night, when passing over the walk, to bear in mind the defect in it, and think of it, though he knew it was there and considered that it was dangerous. The plaintiff's mind may have been busied with some train of thought until he was in close proximity to the defect or hole, when he was made conscious of the presence of his acquaintance Heffron on the other side of the street, and whom he accosted, when a hasty colloquy occurred, during which he looked at his acquaintance, and did not look at the walk or for the hole, walking along perhaps ten or fifteen steps, when he stepped in the hole and received his injuries. That the events thus detailed should have occurred as stated by the plaintiff is quite natural, and that his attention should have been momentarily diverted and occupied by his meeting his acquaintance and what passed between them. The case in this respect is quite like the cases of *Cumisky v. Kenosha*, 87 Wis. 286, and *Barstow v. Berlin*, 34 Wis. 357. The existence of the defect may not, under the circumstances, have occurred to his mind. Whether he was guilty of contributory negligence or not was a question for the jury, and depended upon the inferences which the jury might fairly draw from all the facts and circumstances in evidence, and the opinion they might

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form as to the prudence of his conduct. In all cases in which the inference of contributory negligence, or the absence of it, is in doubt, giving to the testimony the construction most favorable to the party charged therewith, the question is for the jury. In any event, the proof of contributory negligence must be clear and decisive, not leaving room for impartial and unbiased minds to arrive at any other conclusion, in order to warrant a nonsuit or an absolute direction to the jury on the ground of contributory negligence. *Kaples v. Orth*, 61 Wis. 533; *Valin v. M. & N. R. Co.* 82 Wis. 6; *McDougall v. Ashland S.-F. Co.* 97 Wis. 382, and cases cited.

The only evidence as to the manner in which the accident occurred was, substantially, that of the plaintiff. The court charged the jury that the burden of proving contributory negligence was on the defendant. While contributory negligence may appear on the plaintiff's own showing, so as to render proof of the fact on the part of the defendant unnecessary, we do not think that the instruction was misleading, in view of the state of the proof and the fact that the court instructed the jury that "contributory negligence could not be presumed in the absence of evidence showing it, or facts and circumstances from which an inference that the plaintiff was guilty of negligence can be properly drawn." We think that the charge on this point, on the whole, is free from objection.

2. We think that the testimony of Dr. Wade, objected to, was properly admitted. He had testified as to the character and nature of the injury, and that "it was a severe sprain." He was a surgical expert, and had attended the case. It was competent to ask him what results usually, or even sometimes, accompany or follow such an injury. This was expert evidence, based upon the knowledge and experience of the witness as a physician and surgeon and his knowledge of the particular case. It is not fairly to be regarded as speculative or conjectural. The defendant had ample op-

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portunity to cross-examine the witness and test the fairness of his evidence.

The record does not show any material error, and we have arrived at the conclusion that the judgment is correct and should be affirmed.

By the Court.— The judgment of the circuit court is affirmed.

McNALLY, Executor, Appellant, vs. McANDREW and another, Respondents.

November 19 — December 10, 1897.

Pleading: Variance: Failure of proof: Gifts: Surrender: Evidence: Transactions with person since deceased: Appeal: Immaterial error.

1. In an action by an executor to foreclose a mortgage given to his testator, a son of the latter was interpleaded as claiming to own the notes and mortgage. He answered claiming to own them by purchase from his father, but at the trial the proof showed that he was the owner by gift. A prior examination of the son, however, under sec. 4096, R. S., had shown the nature of his claim, so that plaintiff was not misled. *Held*, that there was no failure of proof on the part of the son, and no material variance, the substance of the issue being the ownership of the notes, and the means whereby the son became the owner being merely incidental.
2. There being evidence to show that the testator had delivered the notes and mortgage to his son as a gift, with the understanding that the testator should receive the interest on them as long as he lived, further evidence that the notes were afterwards returned to the testator to enable him to collect the interest, and were found among his papers after his decease, did not establish the fact that there had been no gift *in præsenti* or that there had been a revocation or surrender of the gift.
3. To rebut the presumption of a consideration raised by a written assignment from the testator to his son, plaintiff's attorney testified that the son, in his deposition taken under sec. 4096, R. S., had stated that no consideration was paid. Thereupon the court held that the whole deposition, including those parts relating to personal transactions between the testator and his son, had become admissi-

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ble on behalf of the son. Whether this ruling was wrong is not determined, but it is *held* that the error, if any, was not material, the trial being by the court and there being sufficient other competent testimony to support the judgment. In such a case the presumption on appeal is that only competent testimony had weight with the court.

APPEAL from a judgment of the circuit court for St. Croix county: E. B. BUNDY, Circuit Judge. *Affirmed.*

This is an action by the executor of Patrick Riley, to recover the amount of three promissory notes executed by the defendant *James McAndrew* to his decedent in his lifetime. The notes were secured by a mortgage upon land. *W. H. Riley*, a son of Patrick Riley, claimed to be the owner of the notes and mortgage, and was interpleaded. The issue tried was whether *W. H. Riley* was the owner of the notes and mortgage. The court found that he was the owner, and gave him judgment for the amount of the notes against *McAndrew*. As to the plaintiff the action was dismissed. The executor appeals.

W. F. McNally, for the appellant, argued, *inter alia*, that the variance between the pleading and proof was fatal. It was not a variance, but an absolute failure of proof. R. S. sec. 2671; *Kruschke v. Stefan*, 83 Wis. 373; *Crook v. First Nat. Bank*, id. 31; *Albrecht v. M. & S. R. Co.* 87 id. 105; *Lagage v. C. & N. W. R. Co.* 91 id. 507; *K—— v. H——*, 20 id. 238; *Eilert v. Oshkosh*, 14 id. 586; *Borkenhagen v. Paschen*, 72 id. 272; *Warder v. Baldwin*, 51 id. 459; *Southwick v. First Nat. Bank*, 84 N. Y. 428; *Truesdell v. Sarles*, 104 id. 164. The finding of a gift *in præsenti* was not sustained by the evidence. The reservation of the interest was fatal to such a gift. Thornton, Gifts, § 92; *Buswell v. Fuller*, 156 Mass. 309.

For the respondents there was a brief by *John W. Bashford*, and oral argument by *John W. Bashford* and *R. M. Bashford.*

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NEWMAN, J. The appellant claims that there was an entire failure of proof on the part of the defendant *Riley*. This can be true only in a case where the proofs fail to establish the issue in its general scope and meaning. The answer of defendant *Riley* alleged that he was the owner of the notes by purchase from his father. The proofs showed that he was the owner by gift from his father. The substance of the issue tendered by the answer was the ownership of the notes. The means whereby the defendant became the owner was subordinate and incidental. It was not the substance of the issue. Proof of ownership, by whatever lawful means, established the issue for the defendant, in its entire scope and meaning. It has been held by this court, in a case where the complaint was for goods sold and the proof was of a conversion, that the variance was immaterial, because the plaintiff had the right to waive the tort and sue on the contract. *Walker v. Duncan*, 68 Wis. 624. A variance between the allegation and the proofs is not deemed material unless it be made to appear that the adverse party has been actually misled to his prejudice. R. S. sec. 2669; *Harper v. Milwaukee*, 30 Wis. 365-373; RYAN, C. J., in *Delaplaine v. Turnley*, 44 Wis. 43; *Engel v. Hardt*, 56 Wis. 456. The plaintiff had taken the defendant's deposition under sec. 4096, R. S., and knew the true nature of his claim, and must have come expecting to meet the precise claim which the proofs tended to establish. There was no failure of proof or material variance.

The undisputed evidence shows that, some years before his death, Patrick Riley indorsed a written assignment of the mortgage, and the notes secured by it, upon the mortgage, and delivered all the papers, as a gift, to his son *W. H. Riley*. Patrick Riley afterwards told the defendant *McAndrew* that he had given the notes and mortgage to *W. H. Riley*. It was all the time understood that the father

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was to have the interest on the notes so long as he lived. The notes were afterwards given to him, that he might receive the interest, and were found among his papers after his death. These facts are not necessarily inconsistent with the hypothesis that the delivery of the papers to *W. H. Riley* was intended to take effect, *in præsenti*, as a gift. Nor does the fact that he afterwards obtained possession of the notes, for the purpose named, as matter of law establish a revocation or surrender of the gift. 8 Am. & Eng. Ency. of Law, 1317. The evidence is sufficient to support the conclusion of the trial court in that behalf.

The evidence which tended to prove the consummation of the gift was the testimony of T. E. Riley, who was a brother of *W. H. Riley*, and who was present at and witnessed the transaction, and also the testimony of *McAndrew* that Patrick Riley told him that he had given the notes and mortgage to his son *W. H. Riley*. To rebut the presumption of a consideration raised by the written instrument of assignment, the plaintiff's attorney took the witness stand, and testified that the defendant *Riley* had, in his deposition taken under sec. 4096, R. S., testified that no consideration had been paid. The court thereupon held that the whole deposition had become admissible by the introduction of a part of it in evidence by the plaintiff, and it was all received in evidence. This is claimed to be error. But *In re Hess' Estate*, 57 Minn. 282, and Jones, Ev. § 792, and cases cited in the notes, seem to support this ruling. But, if the ruling was wrong, it is not reversible error. The issue was tried by the court. It is no sufficient ground for reversal that incompetent testimony was received, where there is sufficient competent testimony to support the judgment. It will be presumed, in favor of the judgment, that only the competent testimony had weight with the court. *Wheeler & W. Mfg. Co. v. Laus*, 62 Wis. 635; *Hooker v. Brandon*, 75 Wis.

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8–16; *Frisk v. Reigelman*, 75 Wis. 499; *Farr v. Semple*, 81 Wis. 230; *Rozek v. Redzinski*, 87 Wis. 525.

No reversible error is found.

By the Court.— The judgment of the circuit court is affirmed.

ROLLINS, Appellant, vs. HUMPHREY, Garnishee, Respondent.

November 19 — December 10, 1897.

Voluntary assignment: Pleading: Bonds: Erasure of signature of surety: Adopting seal: Partnership: Marshaling assets.

1. An assignment for the benefit of creditors is alleged with sufficient particularity to allow proof of the fact when it is averred that the assignment was made; that it was in due form of law; that all conditions required by statute to give it full effect and validity have been performed; and that the assignee has entered upon the discharge of his duties thereunder.
2. The bond of an assignee for the benefit of creditors, executed by the principal and ninety-five sureties, had been approved by the county judge who took it, and he had certified that the property of the sureties therein named was worth the sum specified. The signature of one of the sureties and his name in the body of the bond had been erased, but it was not shown when the erasure was made. *Held*, that the erasure was not such a suspicious circumstance as to call for explanation before the bond could be admitted in evidence in garnishment proceedings against the assignee.
3. Two or more persons may adopt a single seal. A voluntary assignment, therefore, is not necessarily rendered void as to attacking creditors by the fact that there was but one seal or scroll on the assignee's bond, and that opposite the signature of the assignee.
4. Where a member of a copartnership has made a voluntary assignment of his individual property, creditors of the partnership are not entitled to have their claims paid out of the estate in the hands of the assignee, so long as any of the individual creditors remain unpaid in whole or in part. *Thayer v. Humphrey*, 91 Wis. 276, followed.

APPEAL from a judgment of the circuit court for St. Croix county: O. B. WYMAN, Judge. *Affirmed.*

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On June 15, 1893, the defendant A. J. Goss, being engaged in the banking business at Hudson, made to the garnishee, *Humphrey*, a voluntary assignment for the benefit of his creditors. The assignee accepted the trust, and duly qualified, and entered upon his duties as such assignee. About the same time J. B. Goss, a son of the said A. J. Goss, being engaged in the milling business at River Falls, made a voluntary assignment for the benefit of his creditors to one Weld. December 23, 1893, one Lottie Thayer filed her claim against said *Humphrey*, as such assignee, for $619.40 upon a note for that amount executed by J. B. Goss under the name of J. B. Goss & Co., claiming that A. J. Goss was the company and the partner of J. B. Goss. Judgment was rendered therein for $731.19 against J. B. and A. J. Goss, April 28, 1894. Thereupon such judgment was filed as the claim of Lottie Thayer against *Humphrey*, as assignee of A. J. Goss, and, upon being heard, the same was disallowed by order of the circuit court. The attorneys for the respective parties in the *Thayer Case* were the attorneys for the respective parties in this case. July 25, 1894, the respective attorneys entered into a stipulation entitled in the *Thayer Case*, as follows: "The objections to said claim having been tried by the court on July 24, 1894, and an order having been entered sustaining such objections; and there being many claims similar in their nature to the claim here in question, which are represented by the same attorney, it is therefore stipulated that the decision in this case, or, in the event of an appeal, then the final decision on appeal, shall be controlling and decisive upon all claims of creditors of J. B. Goss & Co., whether here filed or not, so far as the undersigned represents such creditors, so that the decision in this case shall be decisive of all claims depending upon substantially the same facts." The appeal from the judgment in the *Thayer Case* was affirmed by this court, September 26, 1895 (*Thayer v. Goss*, 91 Wis. 90). The appeal from the order so disallowing

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the Thayer claim was affirmed by this court, September 26, 1895 (*Thayer v. Humphrey*, 91 Wis. 276, 289–297).

On September 27, 1894, the plaintiff recovered judgment against J. B. and A. J. Goss upon a note dated April 17, 1893, made by J. B. Goss in the name of J. B. Goss & Co., then doing business at River Falls, for $11,852.67, upon substantially the same facts and upon the same principle as were determined on the appeal from the judgment in the *Thayer Case*. October 2, 1894, the plaintiff brought this action of garnishment based upon that judgment against J. B. and A. J. Goss, as principal defendants, and garnished *Humphrey*, the assignee of A. J. Goss. *Humphrey*, as such assignee, justified under the assignment, and denied all liability. The plaintiff took issue with the answer of the garnishee.

Upon the trial the court found, in effect, in addition to the facts stated, that the bond of the assignee was duly executed by him and duly sealed, but that the sureties in executing the bond adopted the seal of the assignee as their seals, and became thereby bound; that the erasure of the name of P. Q. Boyden,—one of the sureties on the bond,—and in the body thereof, was made by some person unknown and not authorized, after the bond had been duly filed in the office of the clerk of the circuit court; that the ostensible value of the assets of A. J. Goss, at the time of the assignment, was upwards of $1,000,000, and their net value then was over $400,000; that there were creditors of A. J. Goss whose debts were incurred in his individual business, and not in any partnership business, to the extent of about $640,000; that all such creditors, except creditors to the amount of $15,000, had filed and proved their claims pursuant to law, and accepted and received dividends thereon to the amount of about forty-eight per cent. of the face of their claims, and had in all respects accepted and assented to the assignment; that the plaintiff had not filed any claim

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against the estate of A. J. Goss; that the claims of the individual creditors of A. J. Goss, exclusive of the business of J. B. Goss & Co., will much more than exhaust all the individual assets of A. J. Goss; that March 27, 1896, and after the decision of this court in the *Thayer Case*, the garnishee, *Humphrey*, was allowed to amend his answer by pleading the stipulation mentioned; that *Humphrey*, as garnishee, had at no time held any property, credits, or effects belonging to A. J. Goss or J. B. Goss, and was not in any manner indebted to them, or either of them, either jointly or severally.

As conclusions of law the court found, in effect, that the assignment of A. J. Goss was valid; that the assignee's bond therein was sufficiently sealed and valid and binding; that *Humphrey*, as assignee under the assignment, whether valid or not, became the trustee of an express trust in favor of such individual creditors of A. J. Goss as had or should file their claims against his estate; that the plaintiff has a right to file his claim against such assets, but has no right to have any part of the same paid to him as long as any of the individual creditors of A. J. Goss remain unpaid in whole or in part; that the plaintiff was and is bound by the stipulation mentioned; that no ground exists for setting aside the stipulation or to relieve the plaintiff therefrom; that judgment be entered accordingly in favor of the garnishee, *Humphrey*, and against the plaintiff.

From the judgment so entered the plaintiff appeals.

For the appellant the cause was submitted on the briefs of *J. S. White & F. M. White.* They contended, *inter alia*, that it was incumbent on the party offering the bond to explain the erasures,—to show the time when, the person by whom, and the intent with which it was made. *Page v. Danaher*, 43 Wis. 221, 224–226; *Heath v. State*, 14 Tex. App. 213; *Davis v. State*, 5 id. 48; *Kiser v. State*, 13 id. 201; *Smith v. U. S.* 2 Wall. 232; *Courcamp v. Weber*, 39 Neb.

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533, 536–538. The erasure rendered the bond void as to all other sureties not having notice of or consenting to it; and no recovery could be had thereon against such sureties. *Hartley & Co. v. Corboy*, 150 Pa. St. 23, 29; *Smith v. U. S.* 2 Wall. 219, 234–236; *State v. McGonigle*, 101 Mo. 353, 359–368; *State ex rel. Howell Co. v. Findley*, id. 368; *McCramer v. Thompson*, 21 Iowa, 244, 251, 252; *State ex rel. Griswold v. Blair*, 32 Ind. 313, 316; *State v. Craig*, 58 Iowa, 238, 240; *Howe v. Peabody*, 2 Gray, 556; *Heath v. State*, 14 Tex. App. 213, 216; *Davis v. State*, 5 id. 48, 50; *Martin v. Thomas*, 24 How. 315, 317; *Hessell v. Johnson*, 63 Mich. 623. The burden was on the defendant to prove that the other sureties authorized or ratified the alteration. *State ex rel. Howell Co. v. Findley*, 101 Mo. 368; *Schwalm v. McIntyre*, 17 Wis. 232, 235.

For the respondent there were briefs by *Spooner, Sanborn & Spooner*, and oral argument by *A. L. Sanborn*. They argued, among other things, that the mere fact of an alteration or erasure in an instrument does not, *per se*, raise any presumption either for or against the validity of the writing. 2 Am. & Eng. Ency. of Law (2d ed.), 274; *Page v. Danaher*, 43 Wis. 221; *Prieger v. Exchange Mut. Ins. Co.* 6 Wis. 89, 104. The bond was approved by the county judge of St. Croix county. Such approval amounted to a certificate of the sufficiency of the sureties. It is to be presumed that an officer charged with a legal duty has performed it. It is therefore to be presumed either that the erasure was not made until after the approval of the bond, or, if made before, that the judge inquired into the matter and found that it was not made in such a way as to affect the validity of the bond. *Hall v. Smith*, 14 Bush, 604.

CASSODAY, C. J. The plaintiff is a judgment creditor of the alleged firm of J. B. Goss & Co. A. J. Goss was held to be a member of that firm by reason of allowing himself

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to be held out as such, although he was not, in fact, a member at the time the indebtedness to the plaintiff was incurred. The plaintiff, as such creditor of the firm, seeks by this garnishment to reach the assets assigned by A. J. Goss personally to the defendant *Humphrey* upon several grounds.

1. It is contended that the answer of the garnishee fails to allege the assignment to himself by A. J. Goss with sufficient particularity to allow proof of the same. It alleges the making of the assignment, that it was in due form of law, and that all conditions required by the statute to give it full effect and validity had been performed, and that he had entered upon the discharge of his duties thereunder, and denies all liability. If the answer was not sufficiently definite and certain, the plaintiff's remedy was by motion to make it more so. There is no ground for holding that it was insufficient or demurrable.

2. It is contended that the assignee failed to give such a bond as is required by the statute. R. S. sec. 1694. The bond was signed by *Humphrey*, as principal, and ninety-five persons, as sureties, including one P. Q. Boyden, whose signature and name in the body of the bond appear to have been erased. The bond was fully approved by the county judge who took the same, as required by the statute; and he certified that the property of the sureties therein named was worth, in the aggregate, the sum therein specified. Presumptively, the sureties on the bond were sufficient at the time it was so taken and filed. *Bracken Co. Comm'rs v. Daum*, 80 Ky. 388. The erasures mentioned were not such a suspicious circumstance as called for explanation before the bond could be admitted in evidence. *Austin v. Austin*, 45 Wis. 523.

3. Another objection to the bond is that there was but one seal or scroll, and that that was opposite the signature of the assignee, *Humphrey*, the first on the list. It is, undoubtedly, the law that two or more persons may adopt a

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single seal. *Pickens v. Rymer*, 90 N. C. 282; *S. C.* 47 Am. Rep. 521, and cases there cited. See, also, *Draper v. Springport*, 104 U. S. 501. This is not in conflict with *Yale v. Flanders*, 4 Wis. 96. The assignment from A. J. Goss to the garnishee, *Humphrey*, appears to have been valid in all respects.

4. This being so, it is very obvious that, although the plaintiff has the right to prove his claim against J. B. and A. J. Goss, yet the court very properly held that he had no right to have any part of the same paid out of the estate held by *Humphrey*, as the assignee of A. J. Goss, as long as any of the individual creditors of A. J. Goss remained unpaid, in whole or in part. This was settled in the case of *Thayer v. Humphrey*, 91 Wis. 276, 297, 299, and the plaintiff, in the case at bar, appears to have stipulated to abide by that decision. True, the plaintiff has not proved his claim against the assets in the hands of the assignee, *Humphrey;* doubtless for the reason that the fact is, as found by the trial court, that the indebtedness of A. J. Goss, individually, is more than enough to exhaust all the individual assets of A. J. Goss so in the hands of *Humphrey*. Besides, it appears that nearly all of such creditors of A. J. Goss, individually, have proved their claims against his estate in the hands of *Humphrey*, as assignee; and it is very questionable, at least, whether the plaintiff, as a creditor of J. B. Goss & Co., could destroy or frustrate the assignment, as against the creditors of A. J. Goss, individually, who have thus proved their claims, and hence are estopped from controverting the validity of the assignment,— even had the bond been defective.

We perceive no reversible error in the record.

By the Court.— The judgment of the circuit court is affirmed.

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JENSEN, Appellant, vs. THE HUDSON SAWMILL COMPANY, Respondent.

November 20 — December 10, 1897.

***Master and servant:** Personal injuries: Negligence: Contributory negligence: Pleading.*

1. In an action for personal injuries received by an employee in a sawmill whose arm had been caught in an unguarded endless chain on a conveyor, and drawn between the chain and the sprockets, crushing it and otherwise injuring him, a complaint alleging explicitly that the machine was dangerous, that it could have been guarded and protected with little expense so as to obviate the danger; that similar machines in other mills in that locality were so guarded; and that the mill in the neighborhood of the conveyor was not properly lighted so as to enable employees working there to avoid danger while in the discharge of their duties, is *held* sufficient to charge the defendant with actionable negligence which was the proximate cause of the injury.
2. A complaint in such a case alleging, among other things, that the plaintiff was a common laborer, inexperienced and unfamiliar with sawmill machinery and the dangers incident thereto; that the defendant improperly placed him at work in close proximity to the machine mentioned, without informing him of the dangers arising from the unguarded condition of the chain and sprockets of the conveyor; that plaintiff informed defendant, May 22, 1893, that his employment under such circumstances was dangerous, and that he would quit unless the defendant furnished him better light and guarded said chain and sprockets; that the defendant promised to comply with such demands; and that the plaintiff, relying thereon, remained in the employment, and received the injuries of which he complained on the 24th of the same month,— does not, as matter of law, show either contributory negligence or assumption by plaintiff of the risk of being injured in his employment in the manner stated.

APPEAL from an order of the circuit court for St. Croix county: W. F. BAILEY, Judge. *Reversed.*

This is an appeal from an order of the circuit court sustaining a demurrer to the plaintiff's amended complaint, on

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the ground that the same did not state facts sufficient to constitute a cause of action. The complaint alleged, in substance, the following facts:

The defendant was the owner and engaged in operating a sawmill. Situated about in the center of the mill and a part of its machinery, was, at the time of the happening of the injuries complained of, a certain machine, called a conveyor, used for the purpose of carrying and conveying edgings, sawdust, chips, and refuse material from the mill to the engine room, where the same were burned as fuel. The conveyor was about sixty feet long, and at the easterly end raised about the height of nine feet above the floor of the mill, and at the westerly end to about the height of eighteen feet above the floor. Said conveyor was in the form of a huge trough, about twelve inches deep and fourteen inches wide; and running in said trough and over sprockets at each end was an endless chain, constructed of three-quarter inch iron, each of the links of which was flattened on the top, so that it ran along and scraped over the bottom of the trough when the said chain and conveyor were in motion, and the part of the chain running over the top of the sprockets projected to the height of three inches over the rim and top of the trough. The motive power of the mill was steam, and all of the machinery, and particularly the conveyor and chain, revolved and moved with great rapidity, the sprocket wheel making forty revolutions per minute. On the northerly side of said conveyor, and about three feet east of the westerly end thereof, was a spout or slide leading from the edger in the mill to and over said chain and conveyor, carrying the edgings and refuse from said edger over, into, and upon the conveyor and chain. On the southerly and lower end of said spout, leading from said edger, were five iron bars, which extended in a northerly and southerly direction from and parallel with said last-mentioned spout, which extended over said conveyor, preventing the larger

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pieces of said refuse from dropping into and upon the said conveyor and chain and clogging and obstructing the same. On the southerly side of said conveyor, immediately adjacent to and touching the west end thereof, was a certain post, about twelve inches square, for the purpose of supporting the second floor of the mill, and, at the place where the said conveyor was located, it was at all times so dark that it was almost impossible to see the chain and sprockets of the conveyor, and the darkness increased the dangers of the plaintiff's employment, to the knowledge of the defendant. It was the duty of the defendant to provide good, safe machinery and apparatus, and a reasonably safe place in which the plaintiff was to perform said work, and to have and to keep such chain and sprockets, and particularly the lower and westerly end of said chain, and the westerly or lower one of said sprockets, covered and protected, so that the same would not be dangerous to the employees and others in the vicinity thereof. It was so made the duty of the defendant by the laws of the state, but it had, for a long time prior to the happening of the injury complained of, unlawfully, recklessly, and negligently left and permitted the same to be uncovered and unprotected, without any means or devices whatever to prevent its employees and others in the vicinity thereof getting caught in the same and being drawn therein and thereby injured; and said machinery and conveyor were, at the time of the plaintiff's injury, dangerous in the extreme, by reason of the facts herein alleged.

In the spring of 1891 the plaintiff was in the employ of the defendant, as a common laborer in the yard of its mill, on what is known as the "dump." Afterwards, and on May 20, 1893, he was required by the defendant to work and be in the mill, in, around, and between the machinery therein, and to keep the floor of the mill clean and free from sawdust and refuse, and was ordered by the said defendant to work around the said conveyor, and to carry edgings,

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bark, and other refuse thereto, and to the lower end thereof, and put the same upon and in said conveyor, so that it might and would be carried out of said mill. Afterwards, about May 22, 1893, while working as thus directed, the plaintiff became apprehensive that he was liable to or might be injured because the said conveyor was uncovered and unprotected over and around the said chain and sprocket, and because of the almost total darkness therein, and from the fact that no guard or protection existed to prevent his being caught and injured, and, although the plaintiff at that time did not know and apprehend the precise danger and risk incident to such employment, still he thereupon, a few days prior to the happening of his injuries, told the defendant that he considered such place dangerous, and he would then and there quit unless the defendant would properly cover and protect said chain, sprocket, and conveyor, and more particularly the westerly end thereof, and furnish better light, so that the plaintiff could see the machinery of the said mill, and could work around and between the machinery thereof, and especially around the conveyor herein described, without danger of injury; and the defendant thereupon promised to have the same covered, guarded, and protected, so as to prevent the plaintiff being caught and injured thereby, and to provide better light therein, and directed the plaintiff to continue at work in and around said conveyor and machinery. Relying upon said promise, the plaintiff continued in such employment; but the defendant, not regarding its duty, conducted itself so negligently that it failed to provide a good, safe place in which the plaintiff was to perform his work, in not having the mill properly lighted, and particularly in not providing sufficient light so that the plaintiff could see the chain and sprockets of said conveyor, and in not covering, fencing, and protecting the said chain and sprockets as aforesaid. By reason of such negligence in the premises, and while said defective machine was in use and

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operation, and while the plaintiff was engaged as directed and in the strict line of his duty, and under the direction of the said defendant, without fault or negligence on his part, and wholly by reason of the said negligence of the defendant, on the 24th of May, 1893, and while his attention was momentarily attracted elsewhere, his clothes were caught by the said projecting, unguarded chain of said conveyor, and he was drawn therein, and his right arm was drawn under and between the chain and sprockets of said conveyor at the westerly end thereof, and was crushed, torn, and mangled to such an extent that it became necessary to have the same amputated between the wrist and elbow; and his left arm was crushed, torn, lacerated, and bruised, and the tendons and muscles thereof strained and injured, to such an extent that said left arm was crippled and rendered almost useless; and he was also otherwised injured in his head, neck, face, chest, back, spine, and spinal cord, internally and otherwise.

The plaintiff further alleged that he (plaintiff) was a common laborer, wholly unfamiliar with sawmill machinery and the dangers incident thereto and connected therewith, and, prior to the happening of the injury, had no knowledge or notice of the dangerous condition of said conveyor, as the defendant well knew; that his injuries are permanent in their nature, and were caused by the said negligent and careless acts and omissions of the defendant herein, and by taking the plaintiff, a common laborer and an inexperienced man, without knowledge of machinery and of the risks and dangers of the employment, and placing him in and around such unfenced and unprotected and uncovered sprockets and chain of said conveyor, without, as is the fact, informing him of the dangers thereof and incident thereto, and in leaving the said sprockets and chain of said conveyor unprotected and unguarded, and in permitting the said chain to project above the rim of the trough in which the same so

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ran, and in not providing sufficient light so that the plaintiff could see the machinery of the mill.

It was further alleged that there were various devices in existence and in general use at sawmills and factories for the purpose of guarding and covering such chains and sprockets, and that such means and devices could be and were, in such mills other than the one in question, used and employed at little or no expense, and without hindering or affecting the usefulness or operation of the machinery, as the defendant well knew; that, previous to his injury, plaintiff was an able-bodied man, capable of earning, and did earn, large wages; that his injuries so received had rendered him a cripple for life, and incapacitated him for doing any work or labor whatsoever; that he had been compelled to expend large sums of money for medical and surgical aid and attendance, and would be compelled to make large payments for like purposes in the future; that he had been compelled to submit to great bodily and mental pain and anguish, and would be compelled so to suffer for the rest of his life. Judgment was demanded for the sum of $20,000, for the wrong and injuries aforesaid.

The circuit court made an order sustaining the demurrer and directing a dismissal of the complaint, from which the plaintiff appealed.

For the appellant there was a brief by *T. F. Frawley* and *W. C. Donovan*, and oral argument by *Mr. Donovan*.

For the respondent there was a brief by *John W. Bashford*, attorney, and *Bashford, Aylward & Spensley*, of counsel, and oral argument by *R. M. Bashford* and *John W. Bashford*.

PINNEY, J. 1. Upon the subject of the negligence of the defendant, the averments of the complaint are quite explicit as to the dangerous character of the conveyor as it was constructed and operated, and show the absence of the care and

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precaution which ordinarily prudent persons are alleged to observe in respect to similar affairs under like circumstances. It is alleged that the conveyor could have been, as is usual in other mills in that part of the country, guarded and protected with little expense, so that the danger of working around and about the same would have been obviated. There are averments showing that this machine, as constructed and operated, was not reasonably safe. The prominent element of danger relied on is the want of proper light in the mill to enable employees to see the chain and various parts of the conveyor while revolving or moving with rapidity. It does not appear that the danger of working in the mill and around the conveyor was imminent, but the inference is quite clear that, if the mill was properly lighted, the plaintiff and other operatives might, in the discharge of their duties, avoid danger of injury. It was the duty of the defendant to use reasonable care and precaution to prevent injury to the plaintiff and other operatives from the causes mentioned in the complaint. As was said by Mr. Justice NEWMAN in *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 486: "No doubt, the test of negligence is the presence or absence of that degree of care which ordinarily prudent persons are accustomed to observe about the same or similar affairs in the same or similar circumstances." As there said: "The employer may carry on his business in such places as he pleases, and with such machinery and appliances as he may choose, provided only he does not violate the positive law of the land, nor expose his employee to unknown danger." "The employee is deemed to accept the place furnished to work, with the risk of such dangers as he knows or can discover by the exercise of ordinary attention." Failure to properly light the place in a sawmill where the employees are required to work around or in close proximity to strong and dangerous machinery, by which they are liable to suffer sudden and unexpected injury for want of proper light to see the same, is

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relied on as negligence on the part of the employer. If evidence should be given at the trial tending to prove the acts or omissions relied on as negligent, the case would have to go to the jury, that they might draw the proper inferences or conclusions as to whether negligence on the part of the defendant had been established. We think that the complaint does sufficiently charge the defendant with actionable negligence which was the proximate cause of the plaintiff's injury. It does not appear that the conduct of the defendant came up to the standard of persons generally in the same business, under the same or like circumstances, but this will be proper matter of proof at the trial.

2. It is contended on the part of the defendant that the allegations of the complaint show that the plaintiff assumed the risk of injury in his employment from the causes alleged in the complaint, and was guilty of contributory negligence tending to produce the injury of which he complains. It will be convenient to consider these questions together, as they are so nearly related. Indeed, assumption of unusual risk is considered a species of contributory negligence. Whittaker's Smith, Neg. 398; *Nadau v. White River Lumber Co.* 76 Wis. 131; *Hazen v. West Superior Lumber Co.* 91 Wis. 213; *Darcey v. Farmers' Lumber Co.* 87 Wis. 249; *Peterson v. Sherry Lumber Co.* 90 Wis. 93. Where a defect or danger is open and obvious to a person of ordinary intelligence and judgment, although it exists in consequence of the negligence or default of the employer, knowledge of it on the part of an employee of mature years will be presumed; and, although the employer may be said to have been guilty of negligence in keeping his premises or machinery in a dangerous condition, the employee is also guilty of negligence in accepting the service and continuing in it; and this becomes equivalent to contributory negligence on his part, and will prevent a recovery. *Hazen v. West Superior Lumber Co.* 91 Wis. 213. The rule as to the effect

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of the promise alleged to have been made to the plaintiff, and which is said to have induced him to remain in the defendant's employment, seems to be that where there is an objection by an employee against continuing in the employment of the master because of some special risk attending it, and a promise by the master to remove the danger within a reasonable time, a continuation of such employment in consideration of such promise will relieve the employee of the charge of contributory negligence if injured because of such danger within such time, unless the risk is so obvious and immediate that serious injury may probably result from a continuance of the work. "If the services cannot be continued without constant and immediate danger, and the danger and its character are fully known to the employee, he assumes the risk of the employment. . . . If the danger is not great and constant, then such promise may well be deemed to relieve him; but if it is great and immediate, and of such a nature that a prudent man would not ordinarily incur it, such a promise does not nullify or excuse the contributory negligence." *Erdman v. Illinois Steel Co.* 95 Wis. 14, and cases cited.

It is alleged in the complaint that the plaintiff was a common laborer and inexperienced and unfamiliar with sawmill machinery and the dangers incident thereto and connected therewith; and it is charged that the defendant improperly placed him at work in close proximity to the machinery mentioned in the complaint, without informing him of the dangers thereof by reason of the unguarded condition of the chain and sprockets of the conveyor; that he concluded that his employment under such circumstances was dangerous, and that he would quit unless the defendant would furnish better light and properly cover and protect said chain and sprockets, and he so informed the defendant May 22, 1893; that the defendant promised to furnish better light, and to guard and protect said chain and sprockets, and, relying thereon,

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he remained in the said employment, and received the injuries of which he complains, as stated, on the 24th of the same month. In *Jones v. Florence Mining Co.* 66 Wis. 271, it is laid down as "now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them and do his work safely, with proper care on his part." *McDougall v. Ashland Sulphite-Fibre Co.* 97 Wis. 382, and cases cited. As was said in *Rummell v. Dilworth*, 111 Pa. St. 350: "In view of the facts alleged, actual experiment only could disclose to the plaintiff the degree of peril he assumed. The machinery was open to the view of the plaintiff, but whether he was liable to be drawn into the machinery depended upon matters with which he was totally unacquainted, and which he could learn only by actual experiment. The plaintiff cannot be supposed or assumed to have accepted in advance a peril which he could not estimate, and the extent of which, for lack of experience, he could not have known. Where there is any doubt whether the employee was acquainted, or ought to have been made acquainted, with the risk, the determination of the question is necessarily for the jury." If the master has promised to repair a defect within a reasonable time, the fact that the servant subsequently remained in his employment, in the well-grounded belief that the dangers would be obviated, does not necessarily, as a matter of law, make him guilty of contributory negligence. It is a question for the jury whether, in relying upon such promise, and continuing in the employment after he knew

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of its insufficient condition, he was in the exercise of due care. The burden of proof in such a case is upon the company to show contributory negligence. *Hough v. Railway Co.* 100 U. S. 215. It is a question of fact for the jury to determine whether the defect is so serious or the dangers so great that a prudent person would not continue in the performance of the required work. *Chicago D. F. & F. Co. v. Van Dam*, 149 Ill. 337.

For the reasons stated, we do not think that the allegations of the complaint show, as a matter of law, either that the plaintiff was guilty of contributory negligence, or that he assumed the risk of being injured in his employment in the manner stated in the complaint. The proof that will necessarily be admissible in support of the allegations of the complaint will be of the particular facts and circumstances of the case, from which it will be the duty of the jury to draw proper inferences as to these questions, so that ultimately the truth of the matter alleged in the complaint will be for the consideration and determination of the jury; and it is impossible to properly pronounce against the plaintiff, as a matter of law, in advance of the trial. It follows from these views that the order of the circuit court sustaining the demurrer is erroneous and must be reversed.

By the Court.— The order of the circuit court is reversed, and the cause remanded for further proceedings.

DEWEY, Receiver, Appellant, vs. SPRING VALLEY LAND COMPANY, Respondent.

November 20 — December 10, 1897.

Parol agreement to convey land: Specific performance.

A refusal to enforce specific performance of an oral agreement between the managing officer of a railway company and the managing officer of a land company, whereby the railway company was

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to extend its road to a town site of the land company, and the latter was to give it the necessary ground for right-of-way and depot purposes, is *held* not to have been an abuse of discretion, where the making of the agreement was denied by the representative of the land company, and it did not appear that either officer had authority to bind his respective corporation by such an agreement, or that the agreement was ever ratified by either corporation with knowledge of its terms.

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Affirmed.*

This action was brought by the receiver of the Minnesota & Wisconsin Railway Company to restrain the defendant from instituting condemnation proceedings, or otherwise interfering with the rights of the receiver or the railway company in respect of certain lands on which the railway company had located its railroad and depots and terminal facilities, and to enforce the specific performance of an alleged oral agreement to convey the said lands to the railway company.

It was claimed on the part of the plaintiff, and its evidence tended to prove, that the president and moving spirit of the railway company, and the vice president and moving spirit of the defendant land company, made an oral agreement, supposed to be for the mutual advantage of their respective companies, whereby the railway company was to extend and bring its railroad to the defendant's proposed new town, and build its depots and terminal facilities there, and the defendant was to give it deeds of the lands occupied by its right of way, depots, and facilities, free of cost. The road had not yet been surveyed and located, and it was agreed that the president of the railway company should select and locate the lands to be taken for its purposes by the company. The company has built its railroad and depots and terminal facilities on the lands of the defendant as proposed. The defendant refuses to give deeds of the lands occupied by these improvements, but proposes and

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threatens to commence condemnation proceedings to recover from the railway company the value of its lands so taken by it. To restrain the defendant from taking such proceedings, and to enforce the specific performance of the agreement, this action was brought.

The action was tried by a referee. On the part of the plaintiff, the president of the railway company testified, specifically and positively, to the making of the alleged agreement. On the part of the defendant, it was denied, with equal positiveness. It was denied, too, that either person had authority to act for his corporation in the premises. The referee found and reported that, if the alleged agreement was in fact made, it was void because not reduced to writing; that it could not be enforced because it was unfair and indefinite, and not sufficiently established by the testimony; and that it could not be upheld as an irrevocable license, so as to prevent the taking of proceedings by the defendant to recover pay for the lands taken. The court confirmed the report of the referee, and gave judgment for the defendant. From this judgment the plaintiff appeals.

Ray S. Reid, for appellant.

For the respondent the cause was submitted on the brief of *Clapp & Macartney.*

NEWMAN, J. It is not quite plain why the alleged contract should be pronounced unfair. It was surely competent for the parties to agree upon an umpire, who was mutually acceptable, to decide between them how much, and what, lands should be deemed necessary to be taken for the purposes of their contract. Surely the benefit contemplated by the defendant from the building of the plaintiff's railroad to its projected town site was ample consideration for its promises; and since the referee has found that no more land was taken than was reasonably necessary for the purposes of the alleged contract, it is not perceived how the contract could be un-

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fair. Nor is it clear that the contract is too indefinite to be specifically performed, especially after a practical location of the lands to be taken under the contract. A practical location of the premises intended, pursuant to the agreement, is, in many cases, sufficient to give the requisite definiteness to a contract otherwise defective. *Lundgreen v. Stratton*, 73 Wis. 659–663, and cases there cited. But this is not important here, for a different rule controls the case.

Specific performance is not a matter of strict right, but rests in the sound discretion of the court; and the contract sought to be enforced must be fully and clearly proved in all its parts. A mere preponderance of evidence is not sufficient. *Blanchard v. McDougal*, 6 Wis. 167; *Williams v. Williams*, 50 Wis. 311; *Benson v. Cutler*, 53 Wis. 107; *Menasha v. W. C. R. Co.* 65 Wis. 502; *Combs v. Scott*, 76 Wis. 662; *Hadfield v. Skelton*, 69 Wis. 460; *Docter v. Furch*, 91 Wis. 464; *Shenandoah Valley R. Co. v. Lewis*, 76 Va. 833; *S. C.* 12 Am. & Eng. R. Cas. 305, and cases cited in the note. In this case, not only is the fact of the making of the alleged agreement by the persons named denied and in doubt, but it does not appear that either had authority from his respective corporation to bind his corporation by such an agreement, nor that the agreement was ever ratified by either corporation, with knowledge of its terms. In this condition of the evidence, it was clearly not an abuse of discretion by the trial court to refuse to decree specific performance.

By the Court.— The judgment of the circuit court is affirmed.

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LEWIS, Appellant, vs. PRIEN, Respondent.

November 20 — December 10, 1897.

(1) *Court and jury: Directing verdict.* (2, 3) *Boundaries: Locating lost corner: Evidence.*

1. A court is not warranted in directing a verdict unless all the evidence produced, giving it the most favorable inference it will reasonably bear, and admitting that it establishes all that it tends to establish, would not sustain a verdict for the other party. The fact that the evidence preponderates one way so strongly that it would become the duty of the court to set aside a verdict to the contrary, does not warrant the court in taking the case from the jury.
2. The question being as to the original location of a stake marking the corner of a lot, proof that the measurements from the nearest known original stakes on the same line, or points established as correct according to the original survey, reached a location for the disputed corner consistent with that claimed by one of the parties, is admissible in corroboration of her evidence respecting the former location of the stake.
3. The proper method of procedure in locating a lost exterior corner of an inside lot in a block is to start at the nearest known point on one side of the lost corner on the line on which it was originally established, measure to the nearest known corner on the other side on the same line, and, if the length of the line is in excess of that called for by the original survey, divide it between the tracts connecting such two known points, in proportion to the length of the boundaries of such tracts on such line, as given in the survey. To establish such lost corner by measuring from a corresponding lot corner on the other side of the block, parallel with the opposite side of the lot, to the intersection with the boundary of the block in which the lost corner is located, is erroneous.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action of ejectment. The correct location of the south boundary line of lot 8, block 4, of Brooks' addition to the city of Madison, was the disputed question, and that turned on the proper location of the southeast corner of the lot.

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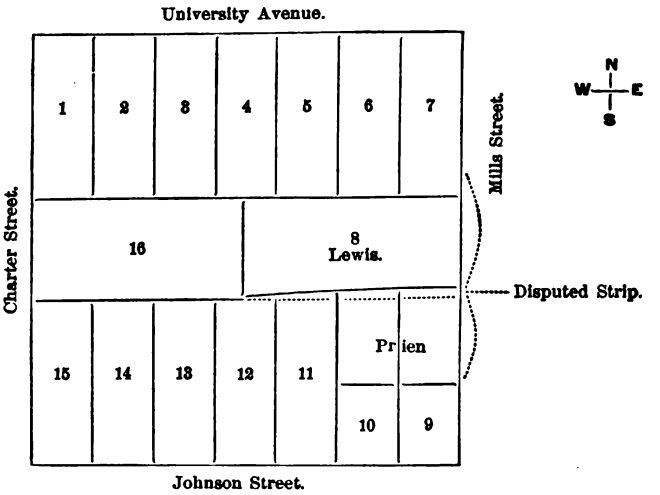
The following is a diagram of the block, with the property owned by the respective parties and the disputed land designated thereon:



At the close of the evidence there was a motion by plaintiff's attorneys for the direction of a verdict in his favor, which was denied and the ruling excepted to. The case was submitted to the jury under instructions to which no exception was taken. The finding was in favor of the defendant. Plaintiff's attorneys moved the court to set aside the verdict and grant a new trial, which was denied and the ruling excepted to. Judgment was rendered in favor of defendant and plaintiff appealed.

For the appellant there was a brief by *Keyes & Shuttleworth* and *G. E. Roe*, and oral argument by *Mr. Roe*. They contended, *inter alia*, that all the corners of lot 8 except the southeast corner are fixed by the original surveyor's stakes. From these monuments the law requires that the disputed line should be established. To fix such line it is only necessary to continue the south line of lot 16 from the southeast corner of that lot eastward in a straight line. Reference to

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the plat shows clearly that the south line of lot 8 is a continuation of the south line of lot 16 and parallel with the north line of lot 8, which is merely a continuation of the north line of lot 16. The same plat also shows the disputed line to be at right angles with the east boundary of lot 16, and the location of the surveyor's stake at the intersection of these lines is shown without dispute. Under such circumstances the location of the disputed line by the method adopted by Dodge is the only correct one. *Marsh v. Mitchell*, 25 Wis. 706; *Fleischfresser v. Schmidt*, 41 id. 223; *State v. Schwin*, 65 id. 207, 215; *Pickett v. Nelson*, 79 id. 9; *Pernam v. Wead*, 6 Mass. 131; *Grier v. Pennsylvania Coal Co.* 128 Pa. St. 79; *Ferguson v. Bloom*, 144 id. 549; *Thornberry v. Churchill*, 16 Am. Dec. 125; 4 Am. & Eng. Ency. of Law (2d ed.), 778, 805, and notes.

For the respondent there was a brief by *Olin & Butler*, and oral argument by *H. L. Butler*.

MARSHALL, J. Did the court err in refusing the motion to direct a verdict for plaintiff? That depends on whether the evidence was all one way to the effect that when the original survey was made the disputed corner was established and the stake set at the point claimed by appellant. The invariable rule governing such cases is too well known to need more than a statement of it here, were it not for the fact that the force of such rule does not appear to be appreciated by the learned counsel for appellant. When a motion is made to direct a verdict for one party, the court is called upon to say, taking all the evidence produced, giving thereto the most favorable inferences it will reasonably bear, and admitting that it establishes what it tends to establish, whether it will sustain a contrary verdict. If so, the motion must be denied. *Leiser v. Kieckhefer*, 95 Wis. 4; *Lawrence University v. Smith*, 32 Wis. 587; *O'Brien v. C. & N. W. R. Co.* 92 Wis. 340; *Dirimple v. State Bank*, 91 Wis. 601. The doctrine that obtains

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in some jurisdictions, that where the evidence preponderates so strongly one way that in case of a verdict otherwise it would be the duty of the court to set it aside and grant a new trial, a verdict should be directed, has not obtained a foothold here. The rule of this court is in accord with the weight of authority on the subject, including that of the federal supreme court. *Elliott v. C., M. & St. P. R. Co.* 150 U. S. 245; *Schofield v. C., M. & St. P. R. Co.* 114 U. S. 615; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469; *Aerkfetz v. Humphreys*, 145 U. S. 418; *Texas & P. R. Co. v. Cox*, 145 U. S. 593. FULLER, C. J., in the last case cited, states very tersely the rule, iterated and reiterated by this court, thus: "The case should not be withdrawn from the jury unless the conclusion follows as a matter of law from the evidence, that no recovery can be had upon any view which could properly be taken of the facts the evidence tends to establish." So it is said that the jury, in all cases where there may reasonably be opposing inferences from the evidence, are the exclusive judges to weigh such evidence and draw the proper inference.

As before intimated, the only justification for discussing at so much length the familiar principle above referred to, is that counsel for appellant, in support of their contention that the trial court erred in denying the motion to direct a verdict, do not appear to claim there was no evidence in opposition to their theory, which, if believed, would sustain an opposite theory. The most that is claimed, apparently, is that there was not much such evidence. True, the evidence on the part of the plaintiff was very positive and clear that the southeast corner stake of lot 8, as it stood at the time of the trial, was in place where located by Douglas, who made the original and governing survey, and the evidence tended strongly to show that the defendant's conduct for years after she purchased and took possession of her property, was more consistent with plaintiff's claim as to the true boundary line

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than with the opposing claim upon which she relied. But defendant testified that the stake, when she purchased, was upwards of a foot further north than where plaintiff sought to establish the true corner; that subsequently it was removed, and later set in the location alleged by plaintiff to be the proper place, and there was considerable corroborating evidence to the same effect. It was conceded on both sides that the original location of the stake would govern if it could be ascertained, whether consistent with the measurements noted on the plat or not; but as to such location the evidence was squarely in conflict. If the place where plaintiff's evidence tended to prove the stake was originally set was in accordance with the truth, then the eaves of defendant's house projected over the boundary line onto plaintiff's property about four inches. If the place where defendant's evidence tended to prove was the original location of the stake was in accordance with the truth, then there was no encroachment by defendant upon plaintiff's premises. Without taking time and space to give the evidence in detail, enough has been said to show generally that there was evidence tending to sustain each of the opposing claims, and yet the evidence was so in conflict that a jury might properly say that they could not determine therefrom, with reasonable certainty, where the stake was originally set, and might properly proceed to re-establish the corner from the evidence, under the rules governing the establishment of lost corners. So the motion to direct a verdict was properly overruled.

Some questions asked of witness Conover, the civil engineer who made a survey at defendant's request and testified to his work upon the trial, were objected to on the ground that such questions called for evidence of a new survey, to demonstrate where the disputed corner ought to be, instead of a survey from original monuments mentioned in the plat and original stakes still in existence, for the purpose of determin-

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ing the point in controversy, i. e. where the stake was set at the time of the original survey. We think the objections were properly overruled, because the questions objected to had a legitimate bearing on the real issue between the parties, that is, the original location of the corner stake, and the trial judge expressly limited the evidence to that and to the establishment of the corner, as one not determinable by proof of the location of the original stake, if the case failed on both sides on that point. Moreover, the witness testified to the location of the southeast corner of the block, as established by him by measuring from original stakes still in existence. He measured from such stakes, on the west and south exterior boundaries of the block, and by that means established the southeast corner, and from the point so established made his final measurements, testified to on the trial. That was a proper way to proceed in view of the controversy on which the case turned. *Racine v. J. I. Case Plow Co.* 56 Wis. 539; *Miner v. Brader*, 65 Wis. 537; and *Madison v. Mayers*, 97 Wis. 399. True, if the facts were undisputed as to the place where the corner of lot 8 was originally established, proof of surveys made to establish it would have been immaterial; but, that being the disputed question, proof that measurements from the nearest known original stakes on the same line, or points established as correct according to the original survey, reached a location for the disputed corner consistent with that claimed by the defendant, was proper, as corroborating her evidence respecting the former location of the stake.

It is further contended, as we understand it, that the evidence does not sustain the verdict because, according to the undisputed evidence, an extension of the south line of lot 8 from the southwest corner, parallel with the north boundary line, shows with mathematical certainty that the proper location of the disputed corner is as claimed by plaintiff. Mr. Dodge, a surveyor called by plaintiff, testified that he

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located the corner by that method; that he paid no attention to the location of the southeast and northeast corners of the block. We know of no rule to warrant the location of a lost corner in that way. The unvarying rule to be followed in such cases is to start at the nearest known point on one side of the lost corner, on the line on which it was originally established; to then measure to the nearest known corner on the other side, on the same line; then, if the length of the line is in excess of that called for by the original survey, to divide it between the tracts connecting such two known points, in proportion to the lengths of the boundaries of such tracts on such line, as given in such survey. To establish the lost exterior corner of an inside lot of a block of platted land by measuring from a corresponding lot corner on the other side of the block, parallel with the opposite side of such lot, to an intersection with the side of the block in which the lost corner exists, and then establish it at the point of intersection, would be as erroneous as to run a line from the quarter-section corner on the west side of a section, through to the east side, parallel with the north or south boundary, to locate the quarter-section corner on such east side. The method always followed in re-establishing corners, is to measure the line connecting the nearest known corners, on the same line, on either side of the lost corner, and then divide the excess, if any be found, as before stated. *Pereles v. Magoon*, 78 Wis. 27; *Jones v. Kimble*, 19 Wis. 429; *O'Brien v. McGrane*, 27 Wis. 446. The witness Conover located the southeast and northwest corners of block 4, and then proceeded as indicated, to determine the location of the disputed corner. That was the only proper way to locate the corner if it was what is known as a lost corner; and it was a proper way to test the truth of the witnesses who testified to the actual location of the stake.

There were numerous exceptions taken to the exclusion of evidence offered on rebuttal, all of which has been exam-

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ined without discovering any ground for a reversal of the judgment. This opinion could be drawn out to great length by discussing such exceptions in detail, but as none of them involve any but very familiar principles, a statement of the reasons for overruling them on this appeal would be without value as a guide in future trials, therefore it is not deemed advisable to say more in regard to them.

By the Court.—The judgment of the circuit court is affirmed.

THE HIGH COURT OF WISCONSIN INDEPENDENT ORDER OF FORESTERS and another, Appellants, vs. THE COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN and another, Respondents.

November 20 — December 10, 1897.

Foreign benefit association: Use of name: Injunction: Issuance of license.

1. A foreign fraternal or beneficiary association which has conducted business under a certain name or designation for many years will not be restrained from the use of such name at the suit of a domestic association, organized under a similar name for similar purposes more than ten years after the former commenced to transact business in this state.
2. The question whether a foreign fraternal benefit association is entitled to a license to transact business in this state, under ch. 418, Laws of 1891, is a matter to be decided by the proper authorities of the state, and cannot be determined in advance by the courts, in an action brought by another corporation to restrain the issuance of the license.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

A. R. Bushnell, for the appellants.

J. M. Clancey, for the respondents.

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CASSODAY, C. J. It appears from the record that this action was originally commenced September 4, 1894, against the commissioner of insurance (Root) alone, to restrain him from granting an insurance license to the *High Court of the Independent Order of Foresters of the State of Illinois;* that October 4, 1894, the *High Court of the Independent Order of Foresters of the State of Illinois* petitioned the trial court to be made a party defendant, on the ground that it was the real party in interest; that October 11, 1894, the trial court ordered the plaintiffs to show cause why such corporation should not be so made a party defendant; that October 15, 1894, the plaintiffs answered, and protested against such Illinois corporation being made defendant herein; that upon the hearing thereof, October 24, 1894, such Illinois corporation was ordered to be made a defendant, with liberty to defend the action, and that the complaint be amended accordingly; that October 30, 1894, the complaint was amended accordingly, but the same relief was prayed as in the original complaint; that November 8, 1894, the Illinois corporation answered; that February 27, 1895, *William A. Fricke,* insurance commissioner, was substituted as defendant in place of Commissioner Root, by order of the court, and the complaint was amended accordingly.

A trial having been had, the court found, as matters of fact, in effect, that the defendant the *High Court of the Independent Order of Foresters of the State of Illinois* was a fraternal, beneficiary association, incorporated as such under the laws of Illinois, February 1, 1882, under that name, as alleged in its answer; that said Illinois corporation, in 1878, used said name in the state of Illinois for the purpose of organizing subordinate lodges and conducting its general business as a fraternal society, as alleged in its answer; that said Illinois corporation commenced to do business in Wisconsin under said name in 1882, and has ever since continued to do business under said name in this state; that ever since the Illinois corporation was incorporated, and ever since it

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has been doing business in this state, it has used, in connection with its regular corporate name, upon its circulars and advertisements, the words "Independent Order of Foresters," being an abbreviation of its true corporate name; that neither of the plaintiffs was in existence when the defendant corporation commenced to do business in this state under its corporate name, nor were they, or either of them, in existence until the defendant corporation had been using said name and the words "Independent Order of Foresters" for several years; that the defendant Illinois corporation appropriated its said corporate name, and used the said abbreviation thereof, in its business in the states of Wisconsin and Illinois and other places, long before either of the plaintiffs was incorporated or known of by the names the *High Court of Wisconsin Independent Order of Foresters*, *Supreme Court Independent Order of Foresters*, or the abbreviation thereof, Independent Order of Foresters, or by any name similar to either of said names; that the plaintiff the *High Court of Wisconsin Independent Order of Foresters* is not now, and never has been, a fraternal or beneficiary corporation, society, order, or association for the relief of members or beneficiaries, furnishing life or casualty insurance or indemnity upon the mutual assessment plan, as alleged in the complaint.

And, as conclusions of law, the court found, in effect, that the defendant Illinois corporation was entitled to the relief demanded in its answer, that the temporary injunction issued herein be dissolved, and for dismissal of this action, with costs, and ordered judgment to be entered thereon accordingly.

From the judgment so entered the plaintiffs appeal.

After a careful examination of the record, we are forced to the conclusion that such findings of the trial court are fully sustained by the evidence. In fact the complaint expressly admits that the first-named plaintiff was not created, organized, or in existence before August 11, 1892 — ten years

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after the defendant corporation commenced doing business in this state. Upon the facts so found, it would be preposterous to hold that the defendant corporation had unlawfully or wrongfully used the name of the plaintiffs or either of them.

The burden of the complaint seems to be that the insurance commissioner was about, improperly, to grant or issue a license to the defendant corporation, when it was not a "fraternal or beneficiary corporation, society, order, or association, furnishing life or casualty insurance or indemnity upon the mutual or assessment plan;" but only that kind of a foreign corporation could be legally licensed to do such business in this state, under ch. 418, Laws of 1891. It is enough to say, as suggested by some of my brethren from the bench, that that was a matter which in no way concerned the plaintiffs, or either of them, but was a question to be determined by the rightful authorities of the state. The plaintiffs cannot be allowed, vicariously, to institute and maintain an action merely to determine whether a foreign insurance corporation shall or shall not be licensed to do business in this state.

By the Court.— The judgment of the circuit court is affirmed.

EVANS, Appellant, vs. CURTISS and another, Respondents. SNOW, Appellant, vs. CURTISS and another, Respondents.

November 20 — December 10, 1897.

Appealable order: Change of venue.

Since the passage of ch. 212, Laws of 1895, an order changing the venue of an action on the ground of convenience of the witnesses is not appealable; subd. 4, sec. 3069, R. S., under which such orders were formerly held appealable having been eliminated by that act. Remarks in *Western Bank v. Tallman*, 15 Wis. 92, *held obiter* and disapproved.

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APPEALS from orders of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

For the appellants there was a brief signed by *A. R. Bushnell*, a brief in reply by *Bushnell & Rogers*, and the cause was argued orally by *A. R. Bushnell.*

For the respondents there was a brief by *J. E. McMullen* and *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford.*

WINSLOW, J. These are two appeals from orders changing venue in the actions above named, on the ground of convenience of witnesses and that such change will promote the ends of justice. The point is made in each case that the orders are not appealable, and we are convinced that the point is well taken. Prior to the passage of ch. 212, Laws of 1895, relating to appealable orders, such orders as those before us were uniformly held appealable, upon the ground that they involved the merits of the action or some part thereof, and hence were included under subd. 4, sec. 10, ch. 264, Laws of 1860, which is practically the same as subd. 4, sec. 3069, R. S. 1878. *Western Bank v. Tallman*, 15 Wis. 92. When sec. 3069 was revised and amended by ch. 212, Laws of 1895, subd. 4 was eliminated; and it follows that the orders which were theretofore appealable by virtue of that subdivision alone ceased to be appealable after the passage of that act. It is true that it is intimated in *Western Bank v. Tallman*, *supra*, that such an order might, perhaps, be held to determine the action within the meaning of subd. 1, sec. 10, ch. 264, Laws of 1860. The decision, however, was not placed upon that ground, and we do not regard the *obiter* remark well founded.

By the Court.— Appeals dismissed.

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THE CAMPBELL & CAMERON COMPANY, Appellant, vs. THE ESTATE OF CARNAGIE, Respondent.

November 20 — December 10, 1897.

Contracts: Construction: Mechanics' liens: Trust fund.

1. A provision in a contract with the state board of control for the construction of a warden's residence, that the balance of the contract price should be paid as soon as the board were satisfied that the work had been completed and were assured against the existence of any mechanics' liens on the building, was not inserted for the benefit of the material men or mechanics, but solely to protect the state against any possible expense or charge on account of such liens. A balance due the contractor, which had been paid over to his administrator after his death, did not, therefore, constitute a trust fund in the hands of the latter for the payment of claims of laborers or material men, so as to give them a preference.
2. The fact that a short time before the death of the contractor in such case he examined the account of a material man, agreed upon the balance due him, and orally promised to pay it when he received the balance due from the board of control, would not impress such balance with a trust in favor of the material man.

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The *Campbell & Cameron Company*, a corporation, filed a petition in the county court of Columbia county, in the matter of the estate of Alexander Carnagie, deceased, to declare a certain fund under the control of the state board of control, due upon a contract for building a residence for the warden of the state prison at Waupun, between said Alexander Carnagie and said board, a trust fund for the payment of the petitioner's claim. Upon answer and a hearing had, the court denied the relief prayed for, and the cause came before the circuit court for the same county on appeal, where the order of the county court was affirmed.

It appears from the finding of facts on the trial in the circuit court that said Alexander Carnagie erected for the

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state a warden's residence at the state prison at Waupun, for the sum of $5,000, and it was accepted December 1, 1893; that one third of said sum was payable August 10, 1893, one third September 10, 1893, and the remainder on completion of the work, or as soon thereafter as the board of control were satisfied that the building was completed, and were assured against the existence of any mechanics' liens thereon; that the entire contract price was paid before December 1, 1893, except $1,063.85; that said Alexander Carnagie died, intestate, December 12, 1893, and A. H. Carnagie is the administrator of his estate, which had not been settled; that the petitioner furnished said Alexander Carnagie in his lifetime lumber and building materials, between August 18 and November 14, 1893, to be used, and which were used, in the erection of said building, upon which a balance of $447.20 remained unpaid; that said Carnagie left a homestead, worth $2,000; that debts had been allowed against his estate to the amount of $5,343.94; that his administrator, February 28, 1895, received from the state board of control the balance due his intestate for erecting said building, of $1,063.85; and that the said decedent, in his lifetime, promised petitioner's agent that he would pay the balance for said lumber, etc., when he collected the money from the state board of control.

The court held that the moneys so paid to the administrator of Alexander Carnagie formed a part of the general assets of the estate of said decedent and did not constitute a trust fund for the payment of the petitioner's demand, and that it was not entitled to any relief on the petition. Judgment was thereupon given, affirming the order of the county court, with costs, from which said petitioner appealed.

For the appellant there was a brief by *Phillips & Hicks*, and oral argument by *E. R. Hicks*.

For the respondent the cause was submitted on the brief of *J. H. Rogers*.

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PINNEY, J. There was a clause in the contract to the effect that the balance of the contract price should be paid "as soon as the board of control are satisfied that said work has been completed, and are assured against the existence of any mechanics' liens on said building." This clause was inserted, not for the benefit of the material men or mechanics, but solely to protect the state against any possible expense or charge on account of liens that might possibly be filed against the building. It was not inserted to give such parties any interest in or control over the fund. It is well understood that no such liens could be allowed or enforced. No agreement is shown that material men or mechanics should have any interest in the unpaid balance, or any right to control or direct its payment; nor has there been shown any assignment, either legal or equitable, or any order, oral or written, by Carnagie, for the payment of any part of that fund to the plaintiff or any other person. In a general sense, the money appropriated for erecting the building was held in trust for that purpose, and could not be diverted by the board of control to any other purpose; but the fund was in no proper sense a trust fund for the petitioner, so that it might intervene and ask a court of equity to apply any part of it to the payment of the balance due the petitioner from Carnagie or his personal representative. The agreement between Carnagie and the board of control, referred to, does not inure to the benefit of the petitioner, either legally or equitably; nor was it a party or privy to that contract; nor was it designed to bind or benefit it by its provisions. It is impossible to say that the balance due Carnagie was in any sense a trust fund for the payment of the balance due from him to the petitioner, or was intended as such. Upon Carnagie's death it passed to his personal representative, to be disposed of in due course of administration, and payment could not lawfully be made by the board of control to any one else upon any alleged

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parol promise made by Carnagie in his lifetime. The petitioner's case wholly fails. It has failed to show that the money due to Carnagie, and paid over to his personal representative, was in any sense whatever a trust fund as to it or for its benefit.

It asked certain findings of fact,—in substance, that, a short time before his death, Carnagie examined the account of the petitioner, and agreed that the balance due it was $447.21, and he would pay the same from the balance due him from the board of control when the board of control paid him the balance due on his contract, but that he was taken fatally ill and died, before he was able to carry out said agreement. This finding was properly refused. It could not have been of the slightest avail to the petitioner.

For the reason stated, the judgment of the circuit court was correct.

By the Court.— The judgment of the circuit court is affirmed.

Purcell, Respondent, vs. Kleaver, Appellant.

November 20 — December 10, 1897.

Appealable order: Vacating judgment: Equity.

1. An order refusing to vacate a judgment on cognovit is an order affecting a substantial right made upon a summary application after judgment, and is therefore appealable under subd. 2, sec. 1, ch. 212, Laws of 1895, even though the judgment was for less than $100 and for that reason not appealable.
2. Equity will not interfere to set aside a judgment which is merely void or voidable but not unjust, but will leave the defendant to his remedy at law.

Appeal from an order of the circuit court for Dane county: R. G. Siebecker, Circuit Judge. *Affirmed.*

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Purcell vs. Kleaver.

This is an appeal from an order which refused to set aside a judgment for $96.13 and costs, entered on a note and warrant of attorney, and an execution issued thereon. The judgment was entered upon a warrant of attorney which reads as follows: "And, to secure the payment of said amount, I hereby authorize, irrevocably, any attorney of said court of record to appear for me in such court, in term time or vacation, at any time hereafter, and confess a judgment, without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon, whether due or not, together with costs, and to waive and release all errors which may intervene in any such proceedings, and to consent to immediate execution upon such judgment; hereby ratifying and confirming all that my said attorney may do by virtue hereof." The answer was signed by one who, though admitted to practice in this court, had not yet been formally admitted to practice in the circuit court. It is also alleged that the complaint is defectively verified. Nothing is alleged against the validity of the debt or the justness of the judgment. The execution was completely satisfied from the defendant's goods.

For the appellant there were briefs by *Haskell & Getts* and *C. E. Buell*, and oral argument by *Mr. Buell.*

For the respondent there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford.*

NEWMAN, J. The order is, no doubt, appealable under Laws of 1895, ch. 212, sec. 1, subd. 2. It is an order affecting a substantial right, made upon a summary application after judgment. This was so held in *Johnson v. Eldred*, 13 Wis. 482, under a statute in the same words, and has been uniformly followed since. That the judgment was for less than $100, and so not appealable, does not affect the rule. *Lewis v. C. & N. W. R. Co.* 97 Wis. 368.

On the merits: Equity little heeds the complaint of one

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impeded by a judgment which is merely void but not unjust, but leaves him to struggle with his embarrassment as best he may, at law. *Thomas v. West*, 59 Wis. 103, and cases cited; *Wilkinson v. Rewey*, 59 Wis. 554. With consistent indifference, it disregards the clamors of one troubled by a judgment which is only voidable but not unjust. *F. Mayer B. & S. Co. v. Falk*, 89 Wis. 216, and cases cited. *Kleaver's* debt is paid. *Purcell* has his money. It is his of right. Equity will not interfere to undo this just consummation.

By the Court.— The order of the circuit court is affirmed.

KOLLOCK, Appellant, vs. SCRIBNER, imp., Respondent.
KOLLOCK vs. SCRIBNER, Appellant, and KAISER, Respondent.

November 22 — December 10, 1897.

Landlord and tenant: Covenant to renew: Execution of new lease: Pleading: Affirmative relief against co-defendant: Effect of dismissal of complaint.

1. A general covenant in a lease to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent, except the covenant to renew.
2. A general covenant to extend or renew a lease does not imply a continuation or renewal of the special covenant, because that would have the effect, by construction, to make the lease perpetual, or to call for renewals in perpetuity. Such interests in land are not favored in the law, and are not, therefore, upheld by construction or deduction from general language.
3. The question of whether a covenant to extend a lease implies the making of a new lease, was settled in this state in *Orton v. Noonan*, 27 Wis. 272, in the affirmative, and *a fortiori* a covenant to renew must have the same effect.
4. The only pleadings in actions under the Code are those prescribed thereby. It constitutes a complete system which preserves all the remedies, both at law and in equity, of the old system and, with the rules of court, prescribes the methods of procedure and

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system of pleading by which the jurisdiction of the court is exercised and the remedies pursued.

5. The system of pleading, consisting of complaint, demurrer, answer, and reply, meets the necessities of all parties, in all cases, and in all courts. The answer setting up new matter constituting a counterclaim, where a defendant seeks affirmative relief against a plaintiff, and the answer setting up facts entitling a defendant to such relief against his co-defendant as the court has jurisdiction to grant under sec. 2883, R. S., take the place of the cross bill of the old practice. The answer of a defendant, seeking relief of his co-defendant, is in the nature of a cross bill, but is an answer and a code pleading nevertheless.

6. A defendant seeking relief of a co-defendant must set up the facts entitling him thereto by answer, and therein claim such relief, and it is proper for the court to require him to serve such answer on the defendant affected thereby and to require the latter to plead to such answer by way of demurrer or reply.

7. Where there is an answer by a defendant, setting up new matter entitling him to relief against a co-defendant, and claiming such relief, and the facts constituting the cause of action in that regard, independent of the principal action, would not entitle such defendant to any relief in equity, if the complaint fails for want of equity, or is dismissed, that carries with it the incidental issues between the co-defendants.

[Syllabus by MARSHALL, J.]

APPEALS from orders of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed on plaintiff's appeal; affirmed on that of the defendant Scribner.*

On the 1st day of April, 1886, Wiley S. Scribner leased to the plaintiff the premises described in the complaint, for the term of ten years from that day, "with the privilege of a renewal." Since that time, up to the commencement of this action, plaintiff occupied the premises under said lease, and performed all the conditions thereof on his part to be performed. Subsequent to the making of the lease the lessor died and defendant *Mary L. Scribner* became the owner of the property by descent, under the laws of this state. Thereafter she sold the property and conveyed the same to defendant *Kaiser* by deed with full covenants, taking back a

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mortgage to secure the payment of $12,000 of the purchase money. She held the mortgage and the debt which it secured at the time of the commencement of this action. Plaintiff duly demanded a renewal of his lease for an additional term of ten years by the making of a new lease containing all the provisions of the old one, except the covenant for renewal. The demand was refused. This action was brought against the defendant *Scribner* and her vendee, *Kaiser*, on a complaint setting forth all the aforesaid facts. Two causes of action were set forth in the complaint, one for specific performance and the other to quiet title. Defendant *Scribner* demurred to the complaint: First, for want of jurisdiction of the court of the subject of the action and over the person of the defendant; second, for improper joinder of two causes of action; third, for failure to state facts sufficient to constitute a cause of action. The demurrer was sustained upon the ground that it appeared from the facts set forth in the complaint that plaintiff was entitled to hold the leased premises for an additional term by extension of the old lease under the agreement for renewal, and was not entitled to a new lease. Defendant *Kaiser* answered, setting up facts entitling him to relief against his grantor on the covenant in his deed by an abatement of the amount of purchase money secured by the mortgage, to the extent of the damages that would result to him from the plaintiff's claim for a renewal of the lease, if such claim prevailed against defendant *Scribner*. Defendant *Scribner* moved the court to strike out that part of the answer constituting, or attempting to set up, a cause of action against her. The motion was denied and the court ruled that the answer stand as a cross complaint by defendant *Kaiser* against his co-defendant. Thereafter such co-defendant demurred to the so-called cross complaint: First, for want of jurisdiction of the person of defendant and the subject of the action; second, because several causes of action were improperly joined;

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third, for failure to state facts sufficient to constitute a cause of action; fourth, for insufficiency as a counterclaim or cross complaint. The demurrer was overruled, and exception to the ruling was duly taken.

Plaintiff appealed from the order sustaining the demurrer of defendant *Scribner*, and she appealed from the order overruling her demurrer to the so-called cross complaint of defendant *Kaiser*.

For the plaintiff there were briefs by *Bushnell & Rogers*, and oral argument by *A. R. Bushnell*.

For the defendant *Scribner* there were briefs by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford*.

For the defendant *Kaiser* the cause was submitted on the brief of *Hall & Sheldon*.

MARSHALL, J. Upon the appeal of the plaintiff we are first called upon to determine whether the agreement to renew the lease was void for uncertainty. On that subject *Laird v. Boyle*, 2 Wis. 431, is cited by defendant *Scribner*, where the court said, in substance, that a general agreement for a renewal, no time or terms being stated, is void for uncertainty. That appears to be a clear adjudication of the question before us. It will not do to ignore it by saying it is mere *obiter*. True, there was another ground upon which the case was decided, which was plain and decisive, but the decision was placed on both grounds, so one was judicially determined as well as the other. But the doctrine there announced, upon which the defendant relies, we may safely venture to say is not supported by any subsequent adjudication of this court or by reputable authority elsewhere. It evidently did not receive careful consideration at the time, as a careful reading of the authorities cited by the learned judge who wrote the opinion fails to disclose any good reason for basing the decision thereon. None of them really appear to touch the question.

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Generally, every contract relating to real estate must be definite in its terms in order to bind the parties so that a court of equity will enforce it by judgment for specific performance. But where the parties thereto have made their contract in writing and it will reasonably admit of two constructions, the court will prefer that which will uphold it rather than the one which will defeat it. Under this familiar rule, leases containing a general promise to renew have been uniformly held to refer to the terms of the lease in which such language is used, so as to be, in effect, an agreement to renew upon the precise terms and conditions therein stated, except as to the condition to renew. That has been uniformly excepted because of the effect, otherwise, to make a perpetual lease. Such result is not favored in the law, so it cannot be accomplished by mere construction, but only by express and unmistakable language. One of the leading cases on this subject, cited by all text writers, is that of *Rutgers v. Hunter*, 6 Johns. Ch. 215, where the court held that a covenant to renew for another term carried with it, by implication, an agreement to renew on the same terms and conditions, as to all the essential conditions of the lease. The chancellor said, in substance, that the covenant was not void for uncertainty because of the failure to specify the terms; that the words used implied the same terms as those contained in the first lease, except the provision which would tend to create an agreement for a perpetual lease; that such an extraordinary covenant as that must be supported by language clear and certain, and not be deduced by construction from the mere general agreement to "renew the lease." To the same effect are *Cunningham v. Pattee*, 99 Mass. 248; *Ranlet v. Cook*, 44 N. H. 512; *McAdoo v. Callum Bros. & Co.* 86 N. C. 419; *Tracy v. Albany Exchange Co.* 7 N. Y. 472; *Western Transp. Co. v. Lansing*, 49 N. Y. 499; *Hughes v. Windpfennig*, 10 Ind. App. 122. In Gear's Landlord & Tenant (§ 102) the rule is laid down thus: "A stipulation for re-

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newal merely will be enforced, as meaning a renewal upon the same terms, with the exception of incidental covenants, including the renewal covenant." In Wood, Landlord & Tenant, 935, on the same subject, it is said: "An unqualified covenant to renew a lease involves the making of a new lease, . . . and for the same period as the original lease. . . . It is well settled, however, that this does not include a new covenant to renew, or any covenant of the former lease that has been fulfilled and is not continuous." And in McAdam, Landlord & Tenant, 255: "A covenant to renew implies the same term and rent, and perhaps the same conditions, excepting that a covenant to renew a lease under the same conditions contained in the original lease is satisfied by the renewal of the lease, omitting the covenant to renew," citing *Carr v. Ellison*, 20 Wend. 178. Many more authorities might be cited to the same effect, but suffice it to say that all are in substantial accord.

The statement in the early case in this state has evidently been considered out of harmony with authorities generally on the subject, as we do not find it referred to by text writers or courts. Many adjudications may be found to the effect that covenants to renew must specify the terms and conditions of the renewal or fail for want of certainty, but that requisite is met and satisfied by the construction of the general promise to renew in connection with the lease to which it refers. When the agreement for a renewal contains language other than that appropriate to a general promise, so that by resort to the settled rules for construction the language of the covenant to renew and conditions of the renewal cannot be made certain, then such covenant fails for want of certainty. Examples of such cases are given in *Tracy v. Albany Exchange Co.* 7 N. Y. 472, such as a contract to renew upon such terms as may be agreed upon, citing *Whitlock v. Duffield*, Hoff. Ch. 110; 4 Kent, Comm. 108; *Abeel v. Radcliff*, 13 Johns. 297. The same cases are

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cited to illustrate the same proposition in McAdam, Landlord & T. 255.

It follows from the foregoing that the order appealed from cannot be sustained upon the ground that the general promise for renewal was too indefinite to be enforced, and it remains to be seen whether the trial court was right in sustaining the demurrer to the plaintiff's complaint upon the theory that a promise to renew is equivalent to a promise to extend, and that a promise to extend does not require or contemplate the making of a new lease.

It is not deemed necessary to discuss, as an original proposition, the question of whether the general promise to renew a lease calls for a new one, or whether, at the option of the lessee, it is extended by the force of the covenant itself and becomes, in effect, a lease for the additional term. The latter construction was given in *Ranlet v. Cook*, 44 N. H. 512, and it has been cited with approval by many courts and text writers. On the contrary, there is much respectable authority to the effect that the words "renew" and "extend" should be construed in accordance with their ordinary meaning. Obviously, one means to prolong, or to lengthen out; the other, to make over, to re-establish, or to rebuild; and those courts and writers that have construed them accordingly certainly have the best of the argument, if the judicial construction is to follow the true definitions of the words. We apprehend that no one would seriously contend that an agreement to renew a note would be satisfied otherwise than by making a new note in place of the old one. It would seem that the construction adhered to in some jurisdictions, that to renew is equivalent to extend, violates the rules of language to reach a judicial construction out of harmony with the universally accepted meaning of the words as defined by lexicographers. That was discussed in *Orton v. Noonan*, 27 Wis. 272, where the renewal covenant used the words "extend the lease." A careful reading of the

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two opinions filed in that case, one by DIXON, C. J., and one by Mr. Justice COLE, leaves no room for controversy but that, while they differed as to the meaning of the term "to extend," as applied to the lease then under consideration, they both held that an agreement to renew a lease called for a new one. Said the chief justice: "The verb 'to extend' implies far less than the verb 'to renew.' The one means to draw forth, to stretch, to prolong, to protract, to continue; the other to make over, to make anew, to give new life to, to restore, recreate, or rebuild." It was by that process of reasoning that he supported his dissent from the opinion of the court delivered by Mr. Justice COLE, holding that the agreement to extend for an additional term contemplated the making of a new lease. Though the decision was rendered *ex necessitate*, there being but two members of the court who participated in it, both were in accord on the question now before us. In any view of the case the decision settled the law on the subject for this court, contrary to the decision of the trial court challenged on this appeal, and no reason is perceived why, after the lapse of a quarter of a century, the controversy should be considered open for discussion, especially on the question of whether an "agreement to renew" and "agreement to extend" are equivalent terms. If they are, then the question of whether a general agreement to renew contemplates a new lease, is foreclosed, because it was there held that an agreement to extend has that effect. And if they are not equivalent terms, then the distinction between them is in favor of the contention that a new lease is required to satisfy an agreement to renew. The decision, though *ex necessitate*, especially after the lapse of so much time, must be considered just as binding as a rule of law on this court and all courts of this state, and between all parties, where the same question arises, as if it were rendered by the unanimous or a majority voice of this court. *Stare decisis, et non quieta movere.*

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What has preceded leaves no further question for consideration on plaintiff's appeal, and it must result in a reversal of the order sustaining the demurrer to the complaint.

On the appeal of defendant *Mary L. Scribner* from the order overruling her demurrer to the answer of defendant *Kaiser*, which answer is termed a cross bill, the chief contention is that the demurrer reached back to the first pleading, i. e. the complaint of the plaintiff, and should have been sustained upon the same ground as that upon which the demurrer of defendant *Kaiser* to such complaint was sustained; that the complaint failing, the cross bill, so called, was carried down with it. We having held that the demurrer to the complaint was improperly sustained, the point upon which, as stated, defendant *Scribner* chiefly relies is no longer necessarily in the case for a decision. But as the question of practice is here, is important, and may have some future bearing on the disposition of the case, we have determined to decide it on account of such probable future bearing on this litigation, and as a guide in future cases as well.

The framers of the Code clearly intended to abolish all distinctions between actions at law and suits in equity, to abolish the forms of all such actions, and to provide that, in this state, there shall be but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action. R. S. sec. 2600. So it is not left for the courts to invent new forms of action in that regard, or use old forms except as preserved in some way by the Code. Generally, all persons having an interest in the subject of an action, and in obtaining the relief demanded, may be joined as plaintiffs. R. S. sec. 2602. And any person may be made a defendant who has, or claims to have, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. R. S. sec. 2603. Also, any per-

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son whose presence is necessary to a complete determination of the controversy, and any person having such an interest in the subject matter of the controversy as requires his presence for his due protection, may be made a party. R. S. sec. 2610. So the Code is quite as broad as the old practice, so far as relates to parties plaintiff and defendant. Now as to pleading, it provides that the forms of pleading for civil actions, and the rules by which the sufficiency of the same are determined, are those prescribed by the statute (R. S. sec. 2644); that the first pleading on the part of the plaintiff shall be the complaint (R. S. sec. 2645); that the first pleading on the part of the defendant shall be a demurrer or answer, and that the answer may contain a general or specific denial of each material allegation of the complaint, controverted by the defendant, or a statement of new matter constituting a defense or counterclaim to the cause of action set forth in the complaint. R. S. sec. 2655. To the answer the plaintiff may demur to the defensive part, and may reply or demur to the counterclaim. That seems to compose the whole scheme for forming issues and presenting questions for determination in all actions, whether heretofore denominated legal or equitable, so far as expressly provided for. It is said that the counterclaim of the Code was intended to preserve to a defendant all remedies he formerly had, either in an action at law or by a bill in equity or a cross bill on similar facts. 2 Wait, Pr. 476, and cases cited. Said BOSWORTH, J., in *Gleason v. Moen*, 2 Duer, 639: "The counterclaim secures to the defendant full relief, which a separate action at law, or a bill in chancery, or a cross bill, could have secured to him on an allegation or proof of the same facts, but it relates to only such causes of action as exist against the plaintiff, and might, in their nature, be the basis of an action against him at the suit of the defendant."

Van Santvoord, in his work on Pleading (page 574), after

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discussing generally the purposes of the cross bill under the old practice, says: "All these various matters which, under the equity practice, were proper subjects for a cross bill, where the object was for relief and not discovery, are supposed to be within the term 'counterclaim,' as used in the Code, and may be set up by the defendant in the action. . . . A cross bill was sometimes necessary in adjusting equities between the defendants, as where the court could not make a complete decree without bringing other matter before the court to be litigated by the proper parties and upon the proper proofs. In such cases it became necessary for one or more of the defendants to file a cross bill. . . . *This, in a proper case, under the Code, it seems, may also be done by an answer.*" The same writer, in his work on Equity Pleading, touching the same subject, uses language indicating that in his opinion the cross bill of the old practice is retained under the Code for some purposes. The cases he cites, however, all treat the pleading as the answer of the Code, as, for example, *Bogardus v. Parker*, 7 How. Pr. 305, where the pleading was an answer claiming affirmative relief on appropriate allegations of facts, and the court said, in effect, that on such a pleading, under the statute, the court could determine ultimate rights between co-defendants and enter the appropriate judgment. The author cites the same cases in his work on Pleading, to support the text there that the relief formerly obtainable by cross bill is obtainable under the Code by answer setting up the facts and claiming such relief. That is in accord with Baylies on Pleading under the New York Code (page 277), citing provisions of such Code, hereafter mentioned. Wait, on the same subject (vol. 2, p. 476), says: "While there are cases in New York that intimate that cross bills in some cases are necessary, nowhere is it expressly decided that a resort to cross pleading under the Code is allowable or proper, or that there can be any case of a failure of justice resulting from an inability to interpose them."

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The apparent uncertainty in the practice, to which reference was made in the last quotation, was subsequently remedied by a statute which did not provide for any additional pleadings, but regulated the practice so as to make the Code pleadings more certainly fit the necessities of all cases. In *New York S. & T. Co. v. Saratoga G. & E. L. Co.* 88 Hun, 569, HERRICK, J., speaking on the same subject, said, in effect, that the cross action, with the forms of procedure relative thereto, no longer exists; that the forms of pleading in all actions are prescribed by the Code, and that alone.

Without further reference to authorities, we think there can be no escaping the conclusion that cross bills, strictly so called, were done away with by the Code. Nevertheless, all the remedies of the old practice are preserved and intended to be worked out through the forms of pleading which the Code prescribes. As we have shown, any person interested in the controversy adversely to the plaintiff, or necessary to a complete determination or settlement of the questions involved therein, or so interested in the subject matter of the controversy as to require his presence for his due protection, is a necessary or a proper party defendant, hence entitled to plead and to set forth by the pleading the facts warranting the relief which the court has jurisdiction to grant. The scope of the pleading must necessarily be broad enough to present all the questions which the court may properly decide in the action and settle by its decree, including any controversy between parties defendant which the court can determine without prejudice to the rights of others or by saving their rights. R. S. sec. 2610. "Judgment may be given for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves, and may grant to the defendant any affirmative relief to which he may be entitled," etc. R. S. sec. 2883. So the relief that may be obtained in the action is quite as broad as under the old practice.

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It follows, necessarily, that a defendant who seeks affirmative relief against a co-defendant cannot obtain it under a counterclaim strictly so called, because that is a proper pleading only as against the plaintiff. So it is clear that the Code is deficient in respect to providing for the necessary pleadings upon which to adjudicate the questions that may be settled by the decree, unless the answer of the defendant who seeks affirmative relief against his co-defendant in respect to a matter germane to the subject of the action may be in the nature of a cross bill under the old practice, but a substitute therefor, and the answer of the Code, nevertheless. That would seem to be the intent of the framers of the Code, and such was the holding in New York before the passage of the law (§ 760, Stover's N. Y. Code) providing for cross actions, and § 521, which provides that where the judgment may determine ultimate rights as between defendants, one who requires such determination must demand it in his answer, and must, at least twenty days before the trial, serve a copy of his answer upon the attorney for each of the defendants affected thereby. It is said in the note by the compilers of the Code, that this provision was enacted to supply an omission to regulate procedure under § 1204, which is identical with sec. 2883 of our statutes, relating to the power of the court to settle ultimate rights between co-defendants, and render the proper administration of the law under it certain. The note states that without some provision regulating the practice, the administration of the remedies under the section to which it refers was difficult. That came from the fact that a person seeking relief against a co-defendant was entitled, by answer, to set forth all the facts requisite to entitle him to such relief, and was not required by statute to serve his answer upon the defendant affected thereby, and the courts were in conflict as to whether service was required independent of the statute. *Bogardus v. Parker*, 7 How. Pr. 305; *Tracy v. N. Y.*

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S. F. Mfg. Co. 1 E. D. Smith, 349. The reason given by the courts of some states having a code practice, for holding the cross bill of the old practice not done away with by such Code, can hardly apply here any more than in New York, from whence our Code was taken. Its framers intended to devise a perfect system that would vest in one court power to administer all the remedies, both at law and in equity, which formerly existed, to be worked out in one form of action and with one system of pleading. As said by Mr. Justice HERRICK, in *New York S. & T. Co. v. Saratoga G. & E. L. Co.* 88 Hun, 569: "While all remedies, both in law and equity, have been undoubtedly preserved, the method of procedure by which the jurisdiction shall be exercised and the remedies pursued have been entirely changed, and will now be found in the Code of Civil Procedure and the rules of court."

It follows, without room for reasonable controversy, that the counterclaim of the Code, in equitable actions, is a substitute for the cross bill of the former equity practice, where the affirmative relief sought by the defendant is against the plaintiff, and that the provisions of law permitting defendants to litigate between themselves matters germane to the subject of the complaint, carries with it the right of the defendant seeking relief in that regard to serve an answer in the action in the nature of a cross bill, setting up the facts and claiming such relief. Such an answer, however, is essentially a code pleading, and though the court may require it to be served on the defendant affected thereby, such service is not necessary unless so ordered to preserve the right of the party to have the questions presented by such answer tried and settled by the decree, if the co-defendant affected is before the court.

Some confusion has no doubt arisen by reason of references, in decisions, to the answer of a defendant seeking relief of his co-defendant in a proper case, as a cross bill,

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leaving it to be inferred that it was the cross bill of the old practice and governed thereby, instead of an answer in the nature of a cross bill, clearly contemplated and authorized by the Code. In *Northwestern M. L. Ins. Co. v. Park Hotel Co.* 37 Wis. 125, the question was suggested but not decided, as to whether affirmative relief can be obtained against a co-defendant on an answer setting up a counterclaim. In *Hopkins v. Gilman*, 47 Wis. 581, there was an answer in the nature of a cross bill and treated as such, but nothing was said about the practice in such cases. In *Trester v. Sheboygan*, 87 Wis. 496, the question was again suggested but not decided, as to whether a defendant can obtain affirmative relief against a co-defendant upon a counterclaim. In *Ballin v. Merchants' Exch. Bank*, 89 Wis. 278, it was held that a defendant seeking relief from his co-defendant must raise the question for a decision by the court by some appropriate pleading, and it was suggested that a cross complaint was proper, as under the old equity practice, but the question of what was the appropriate practice was not necessarily involved in the case further than that a question between defendants, calling for affirmative relief, must be raised by an appropriate pleading.

It follows that a defendant, in any case where the court has jurisdiction to grant him affirmative relief, may set up the facts entitling him thereto by answer in the nature of a cross bill, if he is not so circumstanced as to set up the same by way of counterclaim. It is also the proper practice to serve the answer on the defendant affected thereby, and proper for the court, in the exercise of its inherent power, to require such service to be made, and to cause the issues to be narrowed and sharply presented for adjudication by requiring the defendant against whom relief is sought to plead to the answer setting up the cross demand. Such was the practice in this case, and the fact that the court saw fit to designate the pleading of the defendant *Kaiser* a cross

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bill or cross complaint did not change it. The pleading was authorized by the Code,—it was really the substitute for the cross bill under the old practice; and whether it be called a cross complaint, or cross bill, or answer in the nature of a cross bill, makes very little difference.

It is considered that the matter contained in the answer was germane to the subject of the action, hence properly pleadable; and it remains to be seen what the effect is of a dismissal of a complaint upon the answer of a defendant seeking to obtain relief against a co-defendant for matters not pleadable themselves as a cause of action in equity. There being no statute on the subject providing for retaining the case in such a situation for the purpose of settling the ultimate rights of co-defendants between themselves, the proper practice to be followed is that which formerly existed, that is, the answer of the defendant falls with the complaint and the entire action is at an end. Under the old practice, though the court would retain a case to determine the questions raised by the cross bill claiming affirmative relief as between the defendant and the plaintiff, where the cause of action in such a bill was equitable in its nature, the rule was otherwise where the relief sought thereby could be obtained by legal remedies. The reason for that rule applies with greater force as between co-defendants. Here the relief sought by defendant *Kaiser's* answer was an abatement of the debt due to his grantor by way of an assessment of damages for breach of the covenants in his deed. That was a matter for which there was an adequate remedy at law, and which could not be settled in an equitable action other than as auxiliary to an equitable action to which it was germane or in some way connected, so as to bring the defendant before the court as a party on that account. So, as the case stood before the trial court, the dismissal of the complaint for failure to state a cause of action in equity, properly carried the answer of defendant *Kaiser* with it on

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the demurrer of the defendant *Scribner*. Nevertheless, as we hold that the demurrer to the complaint was improperly sustained, such order on plaintiff's appeal must be reversed, and the order overruling the demurrer to the answer sustained.

By the Court.— So ordered, and that the cause be remanded for further proceedings according to law.

BROWN, Appellant, vs. EDWARD P. ALLIS COMPANY and others, Respondents.

BROWN, Respondent, vs. EDWARD P. ALLIS COMPANY, imp., Appellant.

BROWN, Respondent, vs. PATTERSON, Assignee, imp., Appellant.

November 22 — December 10, 1897.

(1, 2) *Mechanics' liens: Separate contracts: Evidence: Priority.* (3) *Appealable order.*

1. The owners of a building entered into a written contract with A. to equip it with the necessary machinery for a flouring mill, every article to be furnished being expressly indicated. About two weeks after the contract had been completed and accepted in writing, and after the mill had been in operation about that length of time, the owners purchased new pulleys of A. for the purpose of increasing the power. Within six months from the date of the charge for said pulleys, but more than six months from the date of the last charge under the written contract, A. filed a claim for a lien against the premises for the purchase price of all the materials furnished. *Held*, that the pulleys were furnished under a separate contract, and the claim was therefore filed too late to preserve the lien for the materials furnished under the written contract.
2. A building was constructed and equipped as a macaroni factory and operated as such for about two weeks. The owners then put in flouring-mill machinery. In an action to determine the priority of various liens and mortgages on the premises, the admission

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of evidence that the owners had no intention of putting in the milling machinery until after the macaroni factory had been completed is *held* not to have been error.

3. Under ch. 212, Laws of 1895, an order refusing to grant a new trial is not appealable.

APPEALS from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Affirmed in part; reversed in part.*

This was an action to foreclose certain mechanics' liens on the premises in question, assigned to the plaintiff, and to have them, with the mortgage executed thereon to him, adjudged a first lien on the premises.

The defendants *Christian Johnson* and *Enos Johnson*, in the spring of 1895, were the owners and in possession of lot 1, block 11, in the city of Baraboo, Wisconsin. They made a contract with Graf & Netcher, builders, for the construction of a building thereon, to be used for a macaroni factory and for a warehouse and feed-mill purposes. James L. Stewart furnished the lumber, Marriott Bros. furnished the hardware, and Graf & Netcher did the carpenter work. The claims of these parties for material furnished and work done not having been paid, they filed liens against the premises for the unpaid balance. The validity and justice of these claims were admitted. In June, 1895, the *Johnsons* needed money for paying a balance due on the lot, and to pay for the macaroni machinery. The plaintiff furnished them $1,700 June 12, 1895, and took a mortgage on the premises as security, no part of which has been paid. A second mortgage thereon, for $500, was given by them July 12, 1895, to the defendant *Anna Glennon*, which is a third lien. About the 6th of July, 1895, after the building had been completed and the macaroni machinery had been running about two weeks, the *Johnsons* determined to use the building for flouring-mill purposes, provided it was suitable and the engine which they had was of sufficient size to drive mill ma-

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chinery. They conferred with the defendant the *Edward P. Allis Company*, and on the 6th of July, 1895, made an agreement with it by which that company agreed to furnish the necessary mill machinery for that purpose, amounting in all to over $2,800. On the 2d of March, 1896, the *Johnsons* made a voluntary assignment for the benefit of their creditors. On the 27th day of April, 1896, the defendant the *Edward P. Allis Company* filed a material man's lien against the property in question, the validity of which is the principal question in dispute.

On the 14th of May, 1896, the plaintiff, having bought up the liens of the Marriott Bros., James L. Stewart, and Graf & Netcher, commenced this action to foreclose the liens so assigned to him, and, among other things, demanded judgment that his mortgage be adjudged a first lien on said premises. Upon the trial the court found that the plaintiff's liens and his mortgage were a first lien upon the premises; that the lien claimed by the *Edward P. Allis Company* was a second lien; that the *Glennon* mortgage, of $500, was a third lien; and that any balance arising from a sale of the premises should go to the assignee; and judgment was rendered accordingly. The *Edward P. Allis Company* claims that its lien is a valid lien, and is co-ordinate with the liens so assigned and transferred to the plaintiff, and has priority over his mortgage.

The assignee of the *Johnsons*, *Mark L. Patterson*, appealed from that part of the judgment which finds and adjudges that the *Edward P. Allis Company* has any legal lien at all, insisting that it had lost its right to any lien whatever, and demanding that the judgment should be so modified as to give the plaintiff, *Hiland C. Brown*, a first lien by virtue of his mortgage and the liens assigned to him, and to *Anna Glennon* a second lien for $500, and that any surplus arising from a sale of the property, after paying such liens, should go to him as such assignee. The plaint-

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iff, *Hiland C. Brown*, appealed from that part of the judgment which adjudges that the defendant the *Edward P. Allis Company* has a valid claim for a mechanic's lien upon the premises and real estate described in the judgment. The defendant the *Edward P. Allis Company* appealed from that portion of the judgment wherein it is adjudged that the claim of the said defendant the *Edward P. Allis Company* for a mechanic's lien upon the premises and real estate in said judgment described is inferior, subsequent, and subordinate to the claims of the plaintiff, *Hiland C. Brown*, on account of the mechanics' liens and the mortgage of the plaintiff; and also from the order of the circuit court, made January 14, 1897, denying and refusing its motion to set aside said judgment, and grant a new trial of the action, on the ground of newly discovered evidence.

The contract between the *Johnsons* and the said *Edward P. Allis Company* was in writing, wherein and whereby said company expressly indicated every article that was to be furnished by it; and the evidence shows that this company furnished everything that it was to furnish under said contract, and that the machinery was put in place and set running about November 1 of the same year, at which time the *Johnsons* accepted it in writing. About two weeks after such acceptance, and after the mill had been running about that length of time, the *Johnsons* concluded to make a change in it, by getting some larger pulleys, which would have a tendency to increase the power, and for that purpose ordered some extra machinery of the said *Edward P. Allis Company*, on the 25th of November, 1895, amounting to $52.37. This was the last item and date thereof in the claim, of matters furnished by said company for said mill; and, including it, the company claimed also the sum of $2,558.54, under the written contract between it and the *Johnsons*, but did not file its claim of lien until the 27th day of April, 1896. The purchase made by the *Johnsons* of the *Edward P. Allis Com-*

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pany on November 25, 1895, was a separate and independent account or transaction, and was not any part of the original contract in writing, which had been fully performed and accepted before such additional purchase. Under the original contract, the *Edward P. Allis Company* retained title to the property furnished by them until performance and acceptance of their work. Their lien was not filed until more than six months after the date of the charge for the work specified in such original contract.

At the trial, the plaintiff was allowed, against the objection of the defendant the *Edward P. Allis Company*, to introduce parol evidence to the effect that the *Johnsons* in the beginning only intended to erect a macaroni and feed mill and warehouse, and that such mill was fully completed some time in June, 1895, and had been so completed and in operation for about two weeks before the *Johnsons* determined to put in flouring-mill machinery; and the court found accordingly, and that, as the evidence showed, they did not determine to add a milling plant to the factory until between the 4th and the 6th of July, 1895. The evidence on this subject is quite clear and convincing.

The plaintiff in his complaint alleged that the claim of the *Edward P. Allis Company*, filed April 27, 1896, was unfounded in fact, and that no right existed therefor; and said company defendant set up its claim for mechanic's lien by way of counterclaim, containing allegations looking to a foreclosure of said lien. The plaintiff, in his reply, denied that the last item of machinery was furnished November 25, 1895, but averred that it was furnished July 6, 1895, and denied that the claim of the *Edward P. Allis Company* for a lien was filed within six months from the date of the last charge for furnishing such machinery and material.

Herman Grotophorst, for the plaintiff and the defendant *Patterson*.

G. Stevens, for the *Edward P. Allis Company*.

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PINNEY, J. 1. The principal question in this case is whether the defendant the *Edward P. Allis Company* has a mechanic's lien on the premises described in the complaint, and, if so, its date and amount. This point determined, all other questions are free from difficulty. The only interest the defendant the *Edward P. Allis Company* asserts is under the lien it filed April 27, 1896, more than six months after that company had performed its written contract with the *Johnsons* and performance of it had been accepted. The amount that thus became due to it was $2,870. This was an entire transaction. The claim for lien is for this item, and the amount of an entirely separate and independent transaction, an item of $52.37, for pulleys, etc., furnished November 25, 1895. This made its entire claim, consisting of two items, $2,922.37, upon which $500 had been paid, leaving a balance due of $2,422.37. The evidence is entirely clear on this point. Over four months elapsed between the performance of the written contract, under which the amount due on it accrued, and the contract for the $52.37, of November 25, 1895. The matter of this last sum was entirely outside of the written contract.

The statute (sec. 3318, S. & B. Ann. Stats.) provides that "no lien hereby given shall exist, and no action to enforce the same shall be maintained, unless within six months from the date of the last charge for performing such work or labor, or of the furnishing of such materials, a claim for lien shall be filed," etc. The claim for lien was confessedly filed more than six months after the date of the charge under the written contract. No connection in fact or in law is shown between these two contracts. Where there are several items of account for goods sold at different times, there must be either an express contract, or the circumstances must be such as to raise an implied contract embracing all the items, so as to make them single or entire. *Secor v. Sturgis*, 16 N. Y. 548. There was here no such express contract, and no

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implied contract embracing all the items. *Zimmerman v. Erhard*, 83 N. Y. 74. Where a party furnishes materials for a building at different times, in order to have a lien for the whole amount furnished, and that a lien might be filed one year after the date of the last charge, it was held such materials must have been furnished under *one* contract. *Fowler v. Bailley*, 14 Wis. 126. And where work is done in the erection of a building according to a contract, and where there is an acceptance of such work, a lien therefor must be filed within six months after such completion or acceptance. *Berry v. Turner*, 45 Wis. 105. This view is supported by the case of *Fish Creek B. & L. D. Co. v. First Nat. Bank*, 80 Wis. 630.

No ground appears for tacking both items of the claim of the *Edward P. Allis Company* together for the purpose of filing a lien for their entire amount. It clearly appears that the *Edward P. Allis Company* wholly failed to file its claim in time to secure a lien for the amount that accrued to it under its written contract, and that it had and has no lien on the premises except for the item of $52.37, furnished and dated November 25, 1895.

2. There was no error in the admission of evidence, nor in the findings thereon, to show that the *Johnsons* did not intend, in the first instance, to put in a milling plant until after the macaroni mill had been completed, and did not determine to do so until after the making of the mortgage to the plaintiff. There was but one structure or mill, namely, the original macaroni factory, which, with additions of machinery, etc., was converted into a flouring mill. The contention of the *Edward P. Allis Company* depended wholly upon showing a valid lien. Whether it had such lien was fairly put in evidence, and tried, and it is plain that it has no lien thereon except for the $52.37, as stated.

3. The order refusing to grant a new trial on the ground of newly discovered evidence was not appealable, and the

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appeal of the *Edward P. Allis Company* therefrom must be dismissed. Laws of 1895, ch. 212.

It follows from these views that the part of the judgment appealed from by the plaintiff which adjudges that the defendant the *Edward P. Allis Company* has a valid claim for a mechanic's lien upon the premises and real estate described in the judgment must be reversed, with costs against said *Edward P. Allis Company*, in favor of the plaintiff, except as to the said sum of $52.37; and that that portion of the judgment which adjudges that the claim of the defendant the *Edward P. Allis Company* for a mechanic's lien upon the premises and real estate in said judgment described is inferior, subsequent, and subordinate to the claim of the plaintiff, *Hiland C. Brown*, on account of the mechanic's liens assigned to him and his mortgage, must be affirmed. The claims of the different parties are entitled to rank and precedence in the application of the proceeds of the sale of the premises as follows: (1) The claim of the plaintiff for the amount due on his mortgage and the several mechanics' liens assigned to him; (2) the claim of the defendant *Anna Glennon* for the amount due on her mortgage of $500, which is prior to the lien adjudged to the *Edward P. Allis Company;* (3) the amount due to the *Edward P. Allis Company* on its said lien of November 25, 1895, for $52.37; and the residue of the proceeds, if any, is to be paid to the defendant *Mark L. Patterson*, assignee of the defendant *Johnsons.*

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment in accordance with the opinion of this court.

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BURNHAM, Respondent, vs. CITY OF MILWAUKEE and others, Appellants.

November 23 — December 10, 1897.

Municipal corporations: Constitutional law: Limitation of indebtedness: "Debt:" Special legislation amending charter.

1. Unpaid instalments upon contracts for the purchase of park lands made pursuant to sec. 13, ch. 488, Laws of 1889, and sec. 8, ch. 179, Laws of 1891 (authorizing the city of Milwaukee to purchase lands for park purposes upon credit, and providing that "for that purpose the proper officers of said city may execute and deliver to the vendor of such land or property purchased, an instrument creating a lien thereon for such purchase money, without creating any corporate liabilities therefor, to secure the whole or any part of the price in instalments"), do not constitute corporate indebtedness within the meaning of sec. 3, art. XI, Const., restricting the power of cities to contract debts. PINNEY and NEWMAN, JJ., dissent.
2. The provision of the laws under which such contracts were made, that no corporate liability should be created, has controlling effect over provisions in the contracts in effect promising to pay the deferred instalments.
3. Ch. 288, Laws of 1897, authorizes the erection of garbage reducing works in cities of the first class and the issue of bonds in payment therefor, and provides that all such bonds issued shall be issued, used, and disposed of in accordance with the provisions of ch. 311, Laws of 1893. Sec. 2 of said ch. 311 provides that no bonds shall be issued under it unless authorized by a vote of three fourths of the common council. Ch. 380, Laws of 1897, amendatory of ch. 288, provides that the common council of any city of the first class, *during the year 1897*, may issue corporate bonds, not exceeding a certain amount, for the purpose of erecting garbage reducing works, providing such issue shall be authorized by a vote of the majority of the members of the common council elect. The city of Milwaukee was the only city of the first class in the state, and no other could possibly come into that class during the year 1897. *Held*, that said amendment was special legislation amending the charter of Milwaukee, and was therefore within the inhibition of subd. 9, sec. 31, art. IV, Const.

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Burnham vs. City of Milwaukee and others.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

The facts are stated in the opinion.

Howard Van Wyck, city attorney, and *Ernest Bruncken*, assistant city attorney, for the appellants.

For the respondent there was a brief by *Timlin & Glicksman*, and oral argument by *W. H. Timlin*. To the point that the park land contracts constitute an indebtedness of the city, they cited *Earles v. Wells*, 94 Wis. 285, and cases cited; *Lake Co. v. Graham*, 130 U. S. 674; *Baltimore v. Gill*, 31 Md. 375; *Ironwood Water Works Co. v. Trebilcock*, 99 Mich. 454; *Brown v. Corry*, 175 Pa. St. 528; *Newell v. People ex rel. Phelps*, 7 N. Y. 9; *La Porte v. Gamewell Fire Alarm Tel. Co.* 45 N. E. Rep. 588, and cases cited; *Culbertson v. Fulton*, 127 Ill. 30; *Spilman v. Parkersburg*, 35 W. Va. 605; *Orvis v. Park Comm'rs*, 45 Am. St. Rep. 252, and note; *Beard v. Hopkinsville*, 23 L. R. A. 402.

WINSLOW, J. This is an action in equity brought by a citizen and taxpayer of the city of *Milwaukee* to restrain the city from issuing $120,000 worth of corporate bonds for the purpose of building and equipping a garbage reduction plant, under the provisions of ch. 288, Laws of 1897, as amended by ch. 380, Laws of 1897. It will be unnecessary to state the pleadings, as the questions on which the case turns can be briefly stated. The plaintiff's principal claims were: (1) That the city had already exceeded its constitutional limit of indebtedness; and (2) that the act authorizing the issue of the bonds was special legislation, and hence unconstitutional, under the provisions of subd. 9, sec. 31, art. IV, Const., which prohibits the passage of any special law for "incorporating any city, town or village, or to amend the charter thereof." Upon motion of the plaintiff, judgment perpetually enjoining the city from issuing the bonds was

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rendered upon the complaint and answer, and the city appeals.

1. Does the corporate indebtedness already exceed five per cent. of its taxable property? The answer to this question depends upon the proper legal construction of certain contracts for the purchase of lands for public parks entered into by the city during the years 1890 and 1891, under the provisions of sec. 13, ch. 488, Laws of 1889, and sec. 8, ch. 179, Laws of 1891. There are fifteen of these park contracts. The city is in possession of the lands named in these contracts, and is improving the same. There have already been paid large sums of money upon the contracts, and there yet remain to be paid more than $600,000, before the entire purchase price of the lands will be paid. If this amount is an indebtedness of the city, then its constitutional limit of indebtedness (Const. art. XI, sec. 3) has already been exceeded; otherwise not. Both of the laws under which these purchases of park lands were made grant the city power to purchase lands upon credit, and then provide that "for that purpose the proper officers of said city may execute and deliver to the vendor of such land or property purchased, an instrument creating a lien thereon . . . for such purchase money, without creating any corporate liabilities therefor, to secure the whole or any part of the price in instalments," etc. Laws of 1889, ch. 488, sec. 13, and Laws of 1891, ch. 179, sec. 8.

Certain of these very contracts were before this court for construction in the cases of *Perrigo v. Milwaukee*, 92 Wis. 236, and *Milwaukee v. Milwaukee Co.* 95 Wis. 424, and the substance of the contracts will be found stated in those cases. In the first of these cases the question was whether such a contract, in the hands of the vendor of the land, was personal property, so as to be subject to taxation, or, in other words, whether it was a *debt due or to become due* or an

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effect; and it was said by the present chief justice in the opinion: "Does this optional agreement held by the city create a debt against the city and in favor of the Perrigos? Certainly not, since, as indicated, it expressly provides that the city shall not thereby be made liable in any manner or form. . . . But the Perrigos are not creditors having a right to an indebtedness against the city which they can enforce by action or otherwise. The further payment by the city of any portion of the purchase price or interest or taxes is entirely optional with the city." Thus it appears to have been distinctly held in that case, after full argument, that the instalments to come due in the future upon such contracts were not debts due from the city to the vendors, but that it was optional with the city whether it would pay them or not.

The question arose again, in a somewhat different form, in the subsequent case of *Milwaukee v. Milwaukee Co.* 95 Wis. 424. Part of this property, at least, was outside of the city limits, and the question arose whether it was exempt from taxation by the county because it was owned by the city. In this case it was held that the legal title to the land was in the vendors, and that the city simply had an option to purchase the same, with the right of possession until default, and that the city was not bound to pay the purchase money; thus distinguishing the case from that of a vendee in possession of lands under a contract binding him to pay the purchase money. Thus it will be seen that the very question whether the future instalments coming due upon these contracts constituted debts or obligations on the part of the city arose distinctly in each of these cases, and was in each case distinctly decided adversely to the plaintiff's contention.

It was very ably contended on behalf of the plaintiff upon the argument that the question arises differently now, and that the decisions in those earlier cases are not necessarily

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controlling in this case; that in those cases the question was one of construction of the laws regulating taxation, while now the question concerns the interpretation of an important clause of the constitution. It is said that these contracts constitute simply a scheme on the part of the parties to evade the constitutional limitation upon municipal indebtedness, and that such a scheme should not be allowed to succeed; that even if there be no debt created by these contracts, in the ordinary signification of the term, still there is such an inchoate obligation that manifestly the city, from mere prudential reasons, will feel bound to make the payments in order to save the property; and thus that the very abuse which the constitution aims to prevent is successfully perpetrated.

We are not unmindful of the weight and persuasiveness of these considerations. Probably there is little chance for a difference of opinion as to the policy of such legislation or of such contracts as those before us; but we cannot twist nor enlarge language in a statute, or even in the constitution, which has a definite and certain legal meaning, even to accomplish laudable results. There is no doubt of the meaning of the word "debt" as used in the law. It means "something owed;" "money due or to become due upon express or implied agreement." 1 Bouv. Law Dict. tit. "Debt." It denotes, not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. *Board of Comm'rs of Monroe Co. v. Harrell* (Ind. Sup.), 46 N. E. Rep. 124. Under the constitution as well as under the law of taxation, the question is, Is the city indebted? Is it under obligation to pay to some one the balance of the purchase price of these lands? It will not do to say that it will probably make the payments, or that it would be foolish not to do so, but we must be able to say that it has contracted, either expressly or impliedly, to do so. This is precisely the same question which arose in the

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other cases above referred to, and in which we decided that there was no debt or legal obligation, and it would seem like juggling with plain words to say now that there is a debt or legal obligation.

We are cited to cases holding, in effect, that a borrowing of money upon a pledge of existing public property, or a charge upon the public revenue, constitutes a debt, within the meaning of such an inhibition as the one here involved, although no promise of payment is in terms made. *Baltimore v. Gill*, 31 Md. 375; *Newell v. People ex rel. Phelps*, 7 N. Y. 9–87. The reasoning on which these decisions rest is that it is a manifest evasion of the law, and that the lender has power to demand and collect the entire amount loaned out of the corporate property; that, while there may be no promise to pay by the corporation, there is a power to enforce *out of the corporate property* by reason of the pledge or hypothecation thereof. Thus it is construed to be a debt because the payment of the amount due may be enforced out of the city funds or property. Such is not the case here. Under these contracts the city acquires no title to the lands covered by the contracts until it pays all the instalments. It may stop such payment at any time, and none of its property can be sold to pay the remaining instalments. The case is somewhat similar to the case of *Stedman v. Berlin*, 97 Wis. 505, where the city, by ordinance granting franchise to a waterworks company, reserved an option to purchase at a specified price, within a specified time; in that case it was held that the stipulation for an option did not constitute an indebtedness within the meaning of the constitution, because it might decline to purchase and thus end the whole matter. So, here, all the future payments are optional with the city. It is not like the case of *Earles v. Wells*, 94 Wis. 285, where there was an agreement to purchase by instalments under the guise of water rental, and which was held to be manifestly an obligation in excess of the constitutional limit. There is

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a class of recent cases much like that of *Earles v. Wells*, and which are cited in the opinion in that case, which reach the same general conclusions, but they manifestly do not in any way affect this case. *Brown v. Corry*, 175 Pa. St. 528. The case which approaches nearest to supporting plaintiff's contention is that of *Ironwood Water Works Co. v. Trebilcock*, 99 Mich. 454, where it was held that a city could not buy an equity of redemption in a waterworks plant subject to a mortgage thereon, which mortgage, if added to the already existing corporate debt, would exceed the constitutional limit. The conclusion is partly based upon the Maryland case of *Baltimore v. Gill*, *supra*, and on the same line of reasoning. We have before indicated wherein that line of reasoning seems to us inapplicable to the present case, and we must decline to follow it, especially in view of the fact that we have already twice construed these very contracts adversely to the views of the Michigan court. See *Kelly v. Minneapolis*, 63 Minn. 125.

The contracts in question are not all worded alike. Some of them contain express provisions that there shall be no corporate liability on the part of the city; others do not contain these provisions, nor do they contain any promise to pay by the city; while still others contain a formal promise to pay by the city. All the contracts, however, were made under the provisions of the laws of 1889 and 1891, authorizing purchases of park lands on credit, before mentioned, and we do not understand that the city had power to make such purchases, except as given by these laws. Upon familiar principles, the provisions of the laws granting the power entered into the various contracts, and must control them, and these laws provide, in substance, that no corporate liabilities shall be created. Hence all the contracts are governed by the same rule. Our conclusion is that the unpaid instalments upon the park land contracts do not constitute corporate indebtedness within the meaning of the

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constitution, because the payment thereof is entirely optional on the part of the city.

2. The bonds in question are proposed to be issued under the provisions of ch. 288, Laws of 1897, as amended by ch. 380 of the laws of the same year. The first of these laws provides for the erection of garbage reducing works in the cities of the first class, and sec. 3 thereof authorizes the issuance of bonds for such purposes, and provides that all such bonds *issued* shall be *issued*, used, and disposed of in accordance with the provisions of ch. 311, Laws of 1893. Turning to this act, we find, by sec. 2 thereof, that no bonds can be issued under it save when authorized by vote of three fourths of the members of the common council elect. By ch. 380, however, sec. 3, ch. 288, is amended and revised plainly for the purpose, among others, of avoiding the necessity of a three-fourths vote of the common council. By the provisions of the new section, the common council of any city of the first class is authorized, *during the year 1897*, to issue corporate bonds, not exceeding $120,000, for the purpose of erecting garbage reducing works, providing such issue shall be authorized by a vote of the majority of the members of the common council elect. That this act, when so amended, is special legislation amending the charter of the city of *Milwaukee*, and thus within the inhibition of subd. 9, sec. 31, art. IV, Const., is plain from a mere reading of the acts and reference to the principles laid down in *Johnson v. Milwaukee*, 88 Wis. 383, and *Boyd v. Milwaukee*, 92 Wis. 456. *Milwaukee* is the only city to which the act can possibly apply. It is the only city of the first class, i. e. having a population of 150,000 and over. No other city can come into that class during the year 1897, or before the taking of the next census in 1900. Laws of 1895, ch. 238. It could be no more certain that the act applied to *Milwaukee* alone if it had been so expressed in words. The case is plainly ruled in this respect by *Boyd v. Milwaukee*, *supra*. The ordinance

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which authorized the bonds was passed by a majority vote of the common council, but not by a three-fourths vote. The law purporting to authorize their issuance upon a mere majority vote is unconstitutional and void; hence the bonds cannot be rightfully issued.

The judgment of the superior court was right and must be affirmed.

By the Court.— Judgment affirmed.

PINNEY and NEWMAN, JJ., dissent from that portion of the foregoing opinion which holds that the unpaid instalments on the contracts in question did not constitute corporate indebtedness within the meaning of sec. 3, art. XI, Const.

LANCTOT, Plaintiff in error, vs. THE STATE, Defendant in error.

November 23 — December 10, 1897.

Foreign marriage: Presumption as to validity: Privileged communication: Husband and wife: Criminal law.

1. Proof that a formal marriage had been solemnized in a foreign country, in a church, by a person assuming the office of priest or minister, raises the presumption that the marriage was in accordance with the laws of the country and valid, and, especially where followed by cohabitation, casts upon the person attacking its validity the burden of showing that the law required some further act or fact.
2. On a trial for adultery, where the prosecution sought to prove the identity of the defendant as one of the parties to a marriage, letters offered for that purpose and claimed to have been written by him to his alleged wife were privileged communications and incompetent; and where they contained matter bearing upon the question of identity their admission, against the objection of the defendant, was a material error.

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Lanctot vs. The State.

ERROR to review a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

The plaintiff in error was convicted of the crime of adultery. It was alleged against him that, having a lawful wife (one Octavia Arvasa) living, he had contracted a formal marriage with one Vienna Michaud, and was living with her in unlawful cohabitation. Two witnesses testified to having been present at a marriage ceremony between the plaintiff in error and Octavia Arvasa; that the ceremony was solemnized by a priest in a church in the province of Quebec, Canada, and was followed by cohabitation and the birth of children, and that Octavia is still alive. The defendant afterwards came to this state, leaving Octavia in Quebec, and made a formal marriage, at Ashland, with one Vienna Michaud, with whom he afterwards cohabited as his wife.

At the close of the evidence on the part of the state, the plaintiff in error moved for a dismissal of the action on the ground that the state had failed to prove the alleged former marriage. The motion was denied. The defendant then testified, denying that he was the man Joseph Lanctot, or that he had been married to Octavia Lanctot, and testified that his true name was John C. Harvey. One witness identified him as John C. Harvey.

The principal burden of the trial was on the question of the identity of the defendant with the Joseph Lanctot who was the party to the marriage ceremony in the church in Quebec. His marriage and cohabitation with Vienna Michaud were conceded. The state, to maintain the issue on its part, introduced in evidence, over the objection of the plaintiff in error, certain letters which, it was alleged, the plaintiff in error had written back to his wife, Octavia, from various places in this state and in Michigan. They were ordinary letters, such as might be expected from persons of his station and circumstances, to the wife he had left behind him, expressive of marital tenderness and affection. They were

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addressed "Dear Wife," and subscribed "Your devoted husband, Joseph Lanctot." But two of them were not subscribed with his name. One said, instead, "You will address Mr. John C. Harvey, Duluth, Minnesota;" the other, "This is my address, Mr. John C. Harvey," adding a post office.

For the plaintiff in error the cause was submitted on the brief of *Howard Benton*, attorney, and *Titus & McIntosh*, of counsel.

The Attorney General, for the defendant in error.

NEWMAN, J. Two questions are presented: (1) Was the evidence of the former marriage sufficient to sustain the conviction? And (2) was the reception of the letters in evidence prejudicial error?

The law relating to proof of foreign marriages seems to be that where a formal ceremony of marriage, solemnized in a church by a person assuming the office of a priest or minister, is shown, it will be presumed, in favor of the marriage, that it is in accordance with the law of the country and valid. So, when such a marriage is shown, especially if followed by cohabitation, the burden is on him who denies the validity of the marriage to show that the law required some further act or fact to make it valid. 1 Bishop, Mar., Div. & Sep. §§ 1115–1122; Whart. Cr. Law (10th ed.), § 1698, par. 1; Freeman's note to *State v. Hodgskins*, 36 Am. Dec. 742–745; *Hutchins v. Kimmell*, 31 Mich. 126; *People v. Loomis*, 106 Mich. 250; *Raynham v. Canton*, 3 Pick. 293–297; *Megginson v. Megginson* (Oreg.), 14 L. R. A. 540, and cases cited in the notes.

The letters received in evidence seem to have a cogent bearing upon the question of the identity of the plaintiff in error with the Joseph Lanctot who was the husband of Octavia Arvasa. It is not clear that they did not turn the scale against the plaintiff in error. That they did not cannot be demonstrated. Certainly the writer of the letters addresses

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himself to Octavia as her husband, under the name of Joseph Lanctot, the real name of her husband. Identity of name is of some weight as evidence of identity of person. There came a time when he notified her, in effect, "My name is to be, no longer Joseph Lanctot, but John C. Harvey." This circumstance seems to be well calculated to persuade the jury that John C. Harvey must be the genuine, original Joseph Lanctot, under an alias.

If these letters were, in truth, what they purport to be and what the state represented them to be, they were confidential communications between husband and wife, which are privileged and protected, and not competent to be received in evidence against the objection of either. It is difficult to conceive of any theory on which they could, consistently, be either offered or received. Certainly, to offer them was utterly inconsistent with the state's hypothesis of the case. That was that the plaintiff in error was the husband of the party to whom the letters had been written. On this hypothesis, the letters were, clearly, confidential communications between husband and wife, and so incompetent. Their admission was reversible error. *Selden v. State*, 74 Wis. 271.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison at Waupun will deliver the prisoner, *Joseph Lanctot*, to the sheriff of Bayfield county, to be held in custody by him until he shall be discharged therefrom according to law.

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In re Hartung.

December 20, 1897.

Supreme court: Original jurisdiction: Enjoining public nuisance.

A mere public nuisance, even though an aggravated one, does not affect the sovereignty, franchises, or prerogatives of the state, or the liberties of its people, so as to warrant the supreme court in entertaining an original action for an injunction.

Application for leave to bring an action in the name of the state: *Application denied.*

N. S. Murphey, for the motion.

C. H. Hamilton, contra.

The application was denied December 20, 1897, and the following opinion was filed January 11, 1898:

Winslow, J. This is an application for leave to bring an original action in this court in the name of the state for the purpose of obtaining a perpetual injunction. The application was first made to the attorney general, and, upon his refusal, to this court.

The petitioner is the chairman of the town board of the town of Wauwatosa, and his proposed complaint and accompanying affidavits tend to show that the city of *Milwaukee* is depositing its garbage to the amount of many loads daily upon the surface of certain parcels of land in the town of Wauwatosa, and leaving the same uncovered, and that the same constitutes a great and intolerable nuisance and menace to the health of the people of the neighborhood, and that the city threatens and intends to continue making such deposits; and, further, that there is no adequate remedy by private action, because the city threatens that, if enjoined from depositing the same in one locality, it will deposit the same upon other parcels of land in the town with whose

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owners it has made contracts for that purpose. Notice of the application was given to the city attorney of *Milwaukee*, and upon the hearing the motion was denied, for reasons now to be briefly given.

The limits of the jurisdiction of this court to entertain an original action for an injunction are well defined, and have been defined ever since the exhaustive discussions of the question by Chief Justice RYAN in the cases of *Attorney General v. Railway Cos.* 35 Wis. 425, and *Attorney General v. Eau Claire*, 37 Wis. 400–442. In the latter case it was said that, to put in motion the original jurisdiction of this court, the question should be one "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." A mere public nuisance, even though an aggravated one, cannot reasonably be said to affect the sovereignty, franchises, or prerogatives of the state, or the liberties of its people. *State v. St. Croix Boom Corp.* 60 Wis. 565. The courts of original jurisdiction are open for the redress of such wrongs, and the prevention of them when threatened, and it must be presumed that the remedies so afforded are ample.

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CASES DETERMINED

AT THE

January Term, 1898.

THE STATE EX REL. FOWLER VS. THE CIRCUIT COURT FOR GREEN LAKE COUNTY.

October 5, 1897 — January 11, 1898.

Injunctions: Foreign corporations: Restraining collection of debt: Jurisdiction: Contempt of court: Punishment.

1. A foreign corporation, doing business and owning property in this state, became insolvent and its business was suspended by proceedings against it in another state, instituted by its creditors, in which a receiver had been appointed. Another foreign corporation, a mere creditor at large of the former, without attempting to obtain a lien of any kind upon its property, commenced in this state an action against it and procured the appointment of an ancillary receiver and an injunction restraining all the other creditors from prosecuting actions at law to enforce collection of like demands. *Held*, that the granting of such injunction was contrary to equity practice and well-established principles of interstate comity; and that it was not authorized by sec. 3227, R. S. (providing that at any stage in proceedings against insolvent corporations "the court may restrain all proceedings by any other creditor against the defendant in such action"),—secs. 3216–3228 being applicable only to proceedings against insolvent domestic corporations.
2. The granting of the injunction in such a case, although ill-advised and erroneous, was not absolutely void, since the court had jurisdiction of the subject matter — the administration of the assets of an insolvent corporation — and of the parties.

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3. The fact that an injunction issued by a court having jurisdiction was erroneous affords no justification or excuse for its violation; but such fact may properly be taken into consideration in awarding punishment for its breach.
4. A foreign corporation cannot be allowed, on the ground of interstate comity, to maintain in the courts of this state actions or proceedings denied to residents of the state or other suitors in its courts.

CERTIORARI to review proceedings of the circuit court for Green Lake county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This was a *certiorari* issued to review the proceedings of the circuit court for Green Lake county against *Chester A. Fowler* for an alleged criminal contempt, for which, upon conviction, he was adjudged to pay a fine of $200 and costs, taxed at $17.70, and in default of payment to be imprisoned in the county jail until such fine and costs were paid, not exceeding thirty days.

The proceedings were instituted by an order requiring said *Fowler* and one D. W. McNamara to show cause on, etc., why they, and each of them, should not be adjudged guilty of wilful disregard and disobedience of an injunctional order entered in the circuit court for Green Lake county March 31, 1897, in the case of the Hibernian Banking Company, a foreign corporation, plaintiff, against the Berlin & Montello Granite Company, defendant, also a foreign corporation, enjoining and restraining "all creditors of the defendant, and all other persons who had not then brought suits against it, from bringing any action at law or in equity against the defendant, or from in any manner interfering with its property," and why the said *Fowler* and McNamara should not be punished accordingly. The injunctional order referred to was contained in an order appointing a receiver in the action in Green Lake county for the Wisconsin property of the Berlin & Montello Granite Company, as auxiliary or ancillary to a receivership ordered on

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the same day by the circuit court of Cook county, Illinois. The contempt charged was the bringing of an action by the relator, *Fowler*, as attorney for A. G. Becker & Co., also a foreign corporation, in the circuit court for Milwaukee county, against the defendant in the present action, and recovering judgment therein against the defendant corporation in favor of said A. G. Becker & Co. for about $25,000, after the issuing, and with knowledge of the existence, of the said injunctional order.

The relator, *Fowler*, objected to the jurisdiction of the circuit court for Green Lake county, that the act charged did not constitute on his part any neglect or violation of duty or misconduct by which the rights or remedies of a party to any action depending or triable in said court had been or might be impaired, impeded, defeated, or prejudiced, and that the alleged contempt was charged as a criminal contempt, and the proceedings against him were not brought in the name of the state of Wisconsin, and, further, that he was not charged with disobedience of any process or *lawful* order of the court. He contended that the injunctional order was issued without authority, and was void.

The complaint in the action wherein the injunctional order had been entered stated, in substance, that the Berlin & Montello Granite Company, an Illinois corporation, was indebted to the plaintiff in the action, the Hibernian Banking Company, in various sums, upon causes of action therein set out, and, among other things, upon a judgment obtained by the plaintiff against the defendant on the 9th of March, 1897, in the circuit court of Du Page county, Illinois, for $3,200 damages and costs, and it alleged that an execution had been issued on said judgment, and returned wholly unsatisfied; that the defendant in the action was the owner of a granite quarry located at Berlin, Wisconsin, and valuable quarries at Montello, in said state, and had operated a quarry at Waterloo, under a lease thereof; that its property con-

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sisted almost wholly of quarry properties and lands used in connection therewith, and the buildings, machinery, and necessary equipment for operating the said quarries, together with a lease of the property at Waterloo, and that prior to the 1st of March, 1897, the defendant was the owner and in possession of a large amount of personal property, of great value, located at its quarry in Berlin, consisting of tools and equipments, and finished and unfinished product of the quarry then upon the grounds, and owned other similar property at Montello; that prior to March 1, 1897, judgments had been given and attachments issued and obtained in divers actions against the defendant, and said personal property had all been sold at execution sale, except finished and partially finished monuments, and building stone, paving blocks, and crushed granite, which had a market value of many thousand dollars if the same could be sold to the best advantage; that said property had been attached and levied upon by divers writs for about $7,000; that it was worth more than $20,000; that the real estate of the defendant had been seized and levied on, under like writs of attachment, for large sums of money, and the defendant was indebted to various persons, aggregating in all $170,000; that it was insolvent, and its assets wholly insufficient to meet its obligations and liabilities; that its property of every kind and description in the state of Wisconsin would not exceed the value of $140,000; that in the circuit court for Cook county, Illinois, on the application of the plaintiff, the Hibernian Banking Company, C. B. Beech had been appointed receiver of the assets and property of the defendant, of every name, kind, or description, and that he had qualified and was acting as such receiver; that said property would be sacrificed at the sheriff's sale unless a receiver should be appointed, with authority to borrow money to pay said execution and judgment liens; and that the said property, and the rents, issues, and profits thereof, were in

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danger of being lost or materially impaired, to that extent that the plaintiff could not, without the relief prayed for, make the amount of its claim.

It demanded judgment: (1) For the amount due and owing to it from the defendant, with costs and disbursements. (2) That all the property of the defendant in the state of Wisconsin be impounded and sequestrated; that the same person appointed receiver by the circuit court of Cook county, Illinois, be appointed receiver for the circuit court for Green Lake county, clothed with the usual authority, etc., and vested with all its title and all its property, real and personal, in the state of Wisconsin; and that he be authorized to borrow money and pledge the property of the defendant in Wisconsin for the payment of such liens, to pay the outstanding claims and judgments against said property. (3) That said receivership be auxiliary to the receivership existing by virtue of the proceedings in the state of Illinois, as an aid thereto. (4) That an injunction be granted, restraining all creditors of said defendant in Wisconsin from bringing any other action or suit at law against the defendant, and that all its creditors have leave to join in said action, sharing expenses, and that they be required, within such time as the court might order, to file their several claims with the receiver, and prove the same,—and for such further and other relief as should be just and equitable.

March 31, 1897, C. B. Beech was appointed receiver of all the debts, property, real and personal, equitable interests, rights, and things in action, of the defendant in the state of Wisconsin, and, upon filing his bond, was to be invested with the usual rights and powers of a receiver, according to law; and he was ordered to proceed to aid and assist in the winding up of said Berlin & Montello Granite Company then proceeding in the circuit court of Cook county, Illinois, to which this proceeding was said to be ancillary.

It was not alleged in the action that the plaintiff had re-

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covered any judgment in any court of Wisconsin against the Berlin & Montello Granite Company, or that it had obtained any attachment or other lien upon any of its property in that state, and there was no allegation to show that the said Hibernian Banking Company occupied any other position than that of a creditor at large of the defendant.

C. A. Fowler, relator, *pro se.*

John J. Wood, Jr., for the respondent, contended, *inter alia*, that the fact that the defendant was a foreign corporation and that the courts of its domicile had appointed a receiver for it is a sufficient basis for the Wisconsin bill. The courts of one state, by the exercise of interstate comity, will aid and assist a foreign receiver, where the same may be done without prejudicing the interests of its own citizens, by the appointment of an ancillary receiver. 8 Am. & Eng. Ency. of Law, 408; Smith, Receiverships, 29, 30; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Sobernheimer v. Wheeler*, 45 id. 614; *Day v. Postal Tel. Co.* 66 Md. 354; *Buswell v. Supreme Sitting Order of the Iron Hall*, 161 Mass. 224; *Platt v. P. & R. R. Co.* 54 Fed. Rep. 569; *Clyde v. R. & D. R. Co.* 56 id. 539; *Ames v. U. P. R. Co.* 60 id. 966; *Hunt v. Columbian Ins. Co.* 55 Me. 290. It should be noted (1) that the courts look to the *common law* and not to any *statute* for their authority to appoint such ancillary receiver; (2) that the receiver is clothed with the same power that a receiver of a domestic corporation would have under the statutes of the forum; (3) that the sole restriction is that the home claimants must be first protected; (4) that after the home creditors are protected the assets are to be distributed ratably. The only question before this court is whether or not the circuit court for Green Lake county had jurisdiction to punish the relator for contempt. *State ex rel. Turner v. Circuit Court for Ozaukee Co.* 71 Wis. 595. By jurisdiction is meant the power to hear and determine causes and render judgment. *Rhode Island v. Massachusetts*, 12 Pet. 718; Van-

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fleet, Collateral Attack, 71, 73, 74; *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263, 269; *Erwin v. Lowry*, 7 How. 172. The circuit court for Green Lake county had jurisdiction of the subject matter of the suit and of the person of the relator, and jurisdiction to impose a fine for contempt and to render judgment accordingly. Secs. 3490, 3491, R. S.

PINNEY, J. 1. The proceeding against the relator seems to have been regularly instituted by an order to show cause in the case in which the injunction had been granted, and was prosecuted as a proceeding in that action. R. S. secs. 3480, 3481. It appears to have been regularly instituted and conducted. The punishment inflicted was such as the court might lawfully inflict in a proceeding for the violation of the injunctional order. The relator insists that the circuit court for Green Lake county had no jurisdiction to grant the injunctional order with the violation of which he was charged. The circuit court for Green Lake county was a court of general jurisdiction in actions at law and suits in equity, and had authority, in actions instituted therein, to grant injunctions in all proper cases (R. S. sec. 2774), and to punish parties for contempt for a violation thereof. It had jurisdiction of the principal action, with authority to hear and decide every motion or application made or pending therein.

2. The granting of injunctions is one of the highest and most important prerogatives of a court of equity. With whatever irregularities the proceeding may be affected, or however erroneously the court may have acted in granting an injunction in the first instance, it must be implicitly obeyed, as long as it remains in existence; and the fact that it has been erroneously granted affords no justification or excuse for its violation. The party against whom it issues, or who is affected by notice of its existence, will not be allowed to violate it on the ground of a want of equity in the

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bill, since he is not at liberty to speculate upon the intention or decision of the court, or upon the equity of the bill, or to question the authority of the court to grant relief upon the facts stated, except upon application to dissolve or vacate the injunction. Upon proceedings for contempt for violation of an injunction, the only legitimate inquiry is whether the court granting the injunction had jurisdiction of the parties and of the subject matter; and the court will not, in such proceedings, consider whether the order was erroneous. If the court had jurisdiction of the subject matter, the fact that its power was erroneously exercised does not render the injunction void, but only voidable upon proper application; and, until set aside or revoked, it is entitled to implicit obedience. 2 High, Injunctions, §§ 1416, 1417. The sole remedy of the party is by motion to vacate the injunction. *Wis. Cent. R. Co. v. Smith*, 52 Wis. 143. It must be obeyed while in existence. *Sullivan v. Judah*, 4 Paige, 444; *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263; *Erie R. Co. v. Ramsey*, 45 N. Y. 647. While the fact that an injunction was erroneously issued in the first instance affords no justification or excuse for its violation, still such fact may properly be taken into consideration in awarding punishment for its breach. *Sullivan v. Judah, supra; Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq. 422; 2 High, Injunctions, § 1418; *Partington v. Booth*, 3 Mer. 148; *Kaehler v. Dobberpuhl*, 56 Wis. 497; *Kaehler v. Halpin*, 59 Wis. 40.

3. If the court had no jurisdiction over the matter involved, or if it exceeded its power by granting the injunction in a matter *beyond* its jurisdiction, its injunction will be treated as absolutely void, and no punishment will be inflicted for contempt for its alleged violation; as, when an injunction is issued against a board of township officers to restrain them from holding an election which they are authorized by law to hold, or where the court has exceeded its power by granting an injunction in a matter over which

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it has no jurisdiction, as by enjoining a board of municipal officers from canvassing the returns of an election, a court of equity having no power to hear or determine such controversies, its injunction will be treated as absolutely void, and punishment inflicted for its violation will not be upheld. 2 High, Inj. § 1425; *Walton v. Develing*, 61 Ill. 201; *Darst v. People*, 62 Ill. 306; *Andrews v. Knox Co.* 70 Ill. 65; *Dickey v. Reed*, 78 Ill. 261; *Ex parte Wimberly*, 57 Miss. 437. Where the court has jurisdiction of the person and the subject matter, and has the legal capacity to hear and decide in respect thereto, a violation of its order will render the party liable to punishment, from which no other tribunal can relieve him. The order in such case, although erroneous, is not void, but valid until reversed or set aside.

4. It is clearly settled that it is no part of the general function of a court of equity to enforce the payment of debts. A mere creditor at large (as the plaintiff in the action in the circuit court for Green Lake county was) has no standing in a court of equity for that purpose. It is only after the creditor has taken and exhausted all the means within his power at law that he has any standing to ask the aid of equity to discover and apply the debtor's property to satisfy his claims. It is necessary to the jurisdiction of a court of equity in such an action that it should be made to appear that the creditor is unable to obtain satisfaction of his debt by seizing property under an execution. The court must be satisfied that there has been an effort in good faith made by the creditor to collect his judgment, and that he has exhausted without avail his remedy at law. The court did not take any jurisdiction under the statute (R. S. secs. 3216–3228) providing for "proceedings against insolvent corporations," although the injunction seems to have been granted under sec. 3227 of that statute, by which, in a proceeding thereunder, at "any stage of the proceedings, the court may restrain all proceedings by any other creditor

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against the defendant in such action;" and the order for subsequent proceedings in the action seems to have been granted as well under that section, on the ground that the action was brought under the statute for proceedings against insolvent corporations, which is applicable only to cases of proceedings against insolvent corporations "incorporated under the laws of this state." The action was certainly not a common-law creditor's action. *Northwestern Iron Co. v. Central Trust Co.* 90 Wis. 576; *Weber v. Weber*, 90 Wis. 474–476; *Hollins v. Brierfield Coal & Iron Co.* 150 U. S. 371, 378.

Although the plaintiff had a complete and adequate remedy at law, as appears from its complaint, it does not follow that the court was without jurisdiction to grant the injunction. The ground on which courts of equity refuse to take cognizance of proceedings in such cases, namely, that the plaintiff has an adequate remedy at law, "is in no proper sense jurisdictional." The court has power to hear and determine the action, and in general will do so unless objection in proper form be taken. This may be by demurrer to the complaint when the objection appears on the face of it; otherwise by answer. If not taken in one or the other of these forms, it is waived. *Peck v. School District*, 21 Wis. 521; *Tenney v. State Bank*, 20 Wis. 152; *Grandin v. Le Roy*, 2 Paige, 509. In *Peck v. School District, supra*, it was said that the objection that the plaintiff has an adequate remedy at law "is no more than a rule of practice in the court of chancery, upon which the action will be dismissed if the attention of the court is called to it at the proper time and in the proper manner; and, although it is most frequently spoken of by courts and writers as a question of jurisdiction, it is strictly inaccurate to call it so. There is no want of jurisdiction, and should the court proceed, after objection taken, according to its own rule, it is very clear that the judgment would not be void." This view of the question of jurisdiction of the subject matter in equity is expressly affirmed in the case of

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Hollins v. Brierfield Coal & Iron Co. 150 U. S. 371. It is there said: "Defenses existing in equity suits may be waived, just as they may in law actions; and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties [as in the present case], in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed, which, if presented, would have resulted in a decree of dismissal. . . . It cannot be doubted that a final decree, providing for a settlement of the affairs of a corporation and a distribution among creditors, could not have been challenged on the ground of a want of jurisdiction in the court; and that notwithstanding that it appeared upon the face of the bill that the plaintiffs were simple-contract creditors; *because the administration of the assets of an insolvent corporation is within the functions of a court of equity*, and, the parties being before the court, it has power to proceed with such administration. If there was a defense existing to the bills as framed, an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defense and objection which must be made *in limine*, and does not of itself oust the court of jurisdiction." *Sage v. M. & L. R. Co.* 125 U. S. 361; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352.

The contention that the jurisdiction of the circuit court for Green Lake county might be rested simply upon the ground that the property and assets of the defendant corporation were a trust fund held for the benefit of the plaintiff and others, its creditors, is reviewed and rejected in *Hollins v. Brierfield Coal & Iron Co.* 150 U. S. 380, 384.

The position that the circuit court for Green Lake county had jurisdiction of the subject matter of the action may well be rested upon the ground that notwithstanding, upon the facts of the complaint, the plaintiffs were simple-contract

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creditors, yet because the administration of the assets of an insolvent corporation is within the functions of a court of equity, and the proper parties being before the court, it had power to proceed therewith. It does not appear that any objection was made to the right of the plaintiff to proceed in that action on the ground that its legal remedies had not been exhausted. The complaint in the action shows that the defendant has a large amount of property within the jurisdiction of the court which had already been seized and was about to be sold for the payment of its debts; that its indebtedness was over $170,000, and the value of its property and estate was $140,000, which had been levied on and attached for claims to the amount of $27,000. The fact of the embarrassed condition of the defendant company, and that a struggle was going on among its creditors for payment out of its assets, would seem to constitute no reason why the court should appoint a receiver for it or restrain any of its creditors from proceeding to collect their demands by actions at law. One object of the action seems to be to authorize the receiver to borrow money upon the property and assets of the corporation to release its property, or save it from sacrifice by sale for the payment of debts. We are not prepared to affirm that a court of equity may rightfully, in a case like the present, resort to such a measure in the administration of the affairs of an insolvent corporation; but upon this subject, as well as upon the question whether the complaint states facts sufficient to constitute a cause of action, it is not necessary to express an opinion. It is sufficient that the court had jurisdiction, as already defined, of the subject matter of the action. The plaintiff being a foreign corporation, its right to recognition in this state, and to sue in its courts, depended upon interstate comity; and whether, as a mere creditor at large of the corporation, it can come into the courts of this state, and maintain upon that ground, merely, an action for the appointment of an

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ancillary receiver in a case like the present, it is not necessary now to consider.

Reference was made at the argument to the case of *National Trust Co. v. Miller*, 33 N. J. Eq. 155, and other decisions in that state on this subject; but it will be found on examination that such decisions rest upon a statute of that state, by the express provisions of which foreign corporations doing business therein were made subject to all the provisions of the New Jersey statute concerning domestic corporations, so far as the same could be applied to foreign corporations, and upon the ground that the legislative design was unquestionably to confer upon the court the same powers in respect to insolvent corporations, created by foreign jurisdictions, having property in New Jersey, that it might exercise over insolvent domestic corporations,—so far, at least, as the exercise of such powers was necessary to the recovery of any assets, whether legal or equitable, and the right to appoint an ancillary or auxiliary receiver to a proceeding instituted against such foreign corporation in the state which created it.

The corporation defendant was insolvent, and its business appears to have been broken up or suspended by the proceedings instituted against it by its creditors. The situation was that the plaintiff, itself a mere creditor at large of the defendant, without any levy or lien of any kind upon the defendant's property, commenced an action against it, in which it sought to reduce its claim to judgment, with a view, doubtless, to ulterior equitable relief. It got an ancillary receiver appointed and an injunction to prevent all other creditors from prosecuting their debtor at law for the recovery of their like demands against it. The effect of these proceedings was to hold at bay all other creditors, and prevent them from proceeding at law against the defendant to collect their debts, or to exhaust their legal remedies in order that they might institute appropriate proceedings in equity for that

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purpose. Under this receivership and injunction,— granted, as it is said, upon the ground of *interstate comity*,— Becker & Co., a creditor of the defendant corporation to the amount of $25,000, was to be kept out of the courts of the state, and prevented from resorting to the courts of Wisconsin to recover at law its demand, or to attach the property of the defendant, its debtor; and its attorney, *Mr. Fowler*, has been prosecuted and fined $200 and costs for instituting and prosecuting to judgment an action at law for the recovery of a legal demand in favor of his client against the insolvent corporation defendant. The effect of this injunction and receivership was to close the doors of the courts of this state most effectually against all of the defendant's creditors, except the plaintiff, while it was proceeding in its action for the recovery of its legal demand against it. In our judgment, the granting of such receivership and injunction is not sustained by, but is contrary to, equity practice and well-settled principles of interstate comity. It appears to have operated harshly and oppressively. It seems to have been granted under a misapprehension as to the applicability of the statute in respect to proceedings against insolvent corporations, incorporated under the laws of this state, to the particular case in hand.

We cannot hold that the injunction was absolutely void because it was erroneous and ill advised. The attorney for Becker & Co. was technically guilty of contempt, in proceeding, in disregard of it, to prosecute its action against the defendant to judgment. The plaintiff, as a foreign corporation, might properly, upon grounds of interstate comity, come into the courts of this state and prosecute its causes and rights of action therein in the same manner and as freely as a citizen of Wisconsin or other suitors under similar circumstances; but we hold that it cannot on that ground be allowed to maintain in such courts actions or proceedings denied to residents of the state or other suitors in its courts.

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No sound reason is perceived why, in this respect, it should be accorded rights or advantages superior to those of residents or such other suitors in the courts of the state.

The proceeding against the relator for contempt, in accordance with the authorities already cited, should have been discharged upon payment by him of the costs thereof. For the reasons stated the order of the circuit court must be reversed, and the cause remanded to that court for further proceedings in conformity with this opinion.

By the Court.—Judgment is ordered accordingly.

SUTTON, Respondent, vs. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

November 16, 1897 — January 11, 1898.

Railroads: Collision at highway crossing: Negligence: Excessive speed: Failure to fence: Restoring highway: Evidence: Failure to give signals: Improper remarks of counsel: Judicial notice.

1. In an action against a railway company to recover for the killing of a team in a collision at a highway crossing in the country, where no statute or ordinance regulated the rate of speed, negligence cannot be inferred from the mere fact that the train was running about forty miles per hour.
2. The failure of a railroad company to properly fence its right of way cannot be the basis of a recovery for the killing of a team at a highway crossing, where there is no evidence tending to show that the fence or its absence had anything to do with the accident.
3. In order to charge a railroad company with negligence by reason of an open ditch in the highway at a crossing, on the ground that the company had failed to restore the crossing to its former condition of usefulness as required by sec. 1836, R. S., it must appear that the ditch was caused by the failure of the company to comply with the statute.
4. The existence of a highway when a railroad was constructed, so as to render it the duty of the company to restore the highway to its former condition of usefulness, under sec. 1836, R. S., is *held* to

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have been established, *prima facie*, by the evidence of witnesses that they were acquainted with the highway at the point in question before the railroad was built and that it was traveled at that time; and introduction of the records of the laying out of the highway was unnecessary.

5. Evidence of witnesses who were not listening for locomotive signals at a highway crossing, and did not have their attention directed to the subject, that they did not hear the whistle blown at the proper distance from the crossing, but did hear it blown at a much less distance, is *held* insufficient to support a verdict to the effect that proper signals were not given.

6. Repeated statements that one of plaintiff's witnesses had been corrupted by the defendant's agents, made by plaintiff's counsel in the presence of the jury while endeavoring to obtain permission to treat such witness as an adverse witness and to read his deposition, which could not be used under sec. 4089, R. S., because the witness was present in court, are *held* to have been so prejudicial to defendant as to warrant reversal of a judgment for plaintiff.

7. This court will not take judicial notice of the fact that a person whose name appears upon its roll of attorneys had removed from the state at the time he signed a notice of appeal.

APPEAL from a judgment of the circuit court for Monroe county: O. B. WYMAN, Circuit Judge. *Reversed.*

This is an action to recover the value of a team of horses killed by a collision with defendant's passenger train upon a country highway crossing about a half mile northwest of the city of Augusta, in Eau Claire county, on the 19th day of March, 1892.

The highway in question runs directly east and west, and is a main road, traveled extensively. The railway track crosses the highway obliquely, from northwest to southeast, and the highway is slightly turnpiked up above the natural level of the ground at the crossing. On the day of the accident a young man named Humes was driving along this highway from west to east. He was driving a young team belonging to his father, hitched to a wagon with a long reach and without any box. He was riding upon the rear hounds of the wagon, or upon the rear bolster, and was leading be-

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hind a heavy team belonging to the plaintiff, which was hitched to a wagon with a wood rack thereon. The young man approached the crossing from the west at about noon, and, as he crossed the track, the rear team (being the plaintiff's team) was struck by the defendant's regular passenger train coming from the northwest at a speed of forty miles an hour, and, as a result of the collision, the team was killed, the rear wagon and harness destroyed, and the young man was instantly killed. The complaint alleged negligence on the part of the railway company in failing to restore the highway to its former state, and in failing to properly fence the same; also in running its train at a dangerously high rate of speed; also in failing to give the proper signal, by sounding the whistle or ringing the bell.

The circuit judge charged the jury that there was no evidence that the train was running at an unlawful rate of speed, and that they could not find negligence because of the speed of the train, nor because of failure to fence, but submitted to the jury the other alleged grounds of negligence. A general verdict was returned for the plaintiff, fixing the damages at $508, and from judgment thereon the defendant appealed.

For the appellant there was a brief by *L. K. Luse*, attorney, and *Thomas Wilson*, of counsel, and oral argument by *Mr. Luse*.

J. J. Sutton, respondent, *in pro. per.*

WINSLOW, J. The defendant claimed upon the trial below that the evidence failed to show any negligence upon its part in any of the ways claimed by the plaintiff, and the questions arising upon this broad claim are properly preserved by exceptions for review upon this appeal. As stated in the statement of the case, negligence causing the injury was claimed by the plaintiff in four respects, viz.: (1) In running the train at a dangerously high rate of speed; (2) in

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failing to properly fence its right of way; (3) in failing to restore the highway to its former condition; and (4) in failing to give the proper signals.

1. The court finally took from the jury the question of the alleged negligent rate of speed of the train, and charged that the evidence did not show negligence in this respect. This was plainly right. The crossing was in the country, where there was no limitation, either by statute or ordinance, upon the speed of trains. Under such circumstances, it cannot be said that it is negligence to run a train at or about the speed of forty miles per hour, or that negligence can be inferred from such fact alone. *Mills & Le Clair L. Co. v. C., St. P., M. & O. R. Co.* 94 Wis. 336.

2. The court also charged that there could be no recovery upon the ground of failure to properly fence the right of way, and this was so clearly correct that we shall spend no time in discussing it, but simply say that there was no evidence tending to show that either a fence, or the absence of a fence, had anything to do with the accident.

3. The statute (R. S. sec. 1836) requires every railway company constructing its road across or upon any highway to restore such highway to its former state, or to such condition that its usefulness shall not be materially impaired. It has been held by this court that this provision applies only to cases where the railroad is built upon or across an already existing highway. *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418. In the present case it is claimed that there was no evidence to show that the highway in question was an existing highway at the time of the construction of the railroad, and hence that the statute above referred to had no application. Upon this point it is sufficient to say that two witnesses acquainted with the locality testified, in substance, that they were acquainted with the highway at this point before the railroad was built, and one of them stated that it was traveled at that time. We re-

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gard this testimony as sufficient to establish, *prima facie* at least, the fact that the highway existed at the time the railroad was constructed over it. We do not think it was necessary for the plaintiff to introduce the record of the laying out of the road, in the absence of any testimony to the contrary.

The defect which it was claimed existed in the highway, and for which it was claimed the defendant was responsible, was that there was a deep ditch within the limits of the highway and of the railroad right of way, just south of the traveled portion of the highway, as it approaches the point of crossing. There was some testimony which tended to show that the young man heard the train, and stopped his horses within a short distance of the crossing, and that they plunged somewhat, and went partially into the ditch, and then came out of it, throwing the young man from his seat to the ground when about crossing the track, just ahead of the train, and so it is claimed that the existence and presence of the ditch was a direct cause of the accident. The radical difficulty with this claim is that it is nowhere shown that the ditch was constructed or caused by the building of the railroad. As far as the evidence shows, it may have existed at the time the railroad was built. Certainly it was necessary for the plaintiff to show that the railroad company failed in performing its duty under the statute, and in so failing caused or made the ditch. There being an entire absence of such evidence, there was nothing to go to the jury upon this ground of negligence.

4. As to the alleged failure to give the statutory signals for the crossing, there was really no evidence which would support a verdict to the effect that the proper signals were not given. No witness testified that the bell was not rung, and two witnesses testified, simply, that they did not hear the whistle blown eighty rods before reaching the crossing, but did hear it blown at a point about forty-five rods west

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of the crossing. Neither of these witnesses was listening for the signal, or had his attention directed to the subject; and under the rule stated in *Wickham v. C. & N. W. R. Co.* 95 Wis. 23, this evidence will not support a verdict that the signal was not given. On the other hand, there was positive evidence, not only on the part of the train employees, but by other disinterested witnesses, that the proper signals were given. In this condition of evidence there was nothing to go to the jury upon this claim of negligence.

These conclusions necessitate reversal of the judgment.

There are some other contentions made, however, which seem to require attention.

The plaintiff called as a witness one Bennett, who was upon the highway at the time of the accident, and was an eyewitness of it. It seems that Bennett's deposition had been previously taken by consent of counsel on both sides, under an oral stipulation that it might be read upon the trial. However, the witness was present at the trial, and so the reason for using it no longer existed, and, under the statute, it was no longer admissible. R. S. sec. 4089. Shortly after beginning the examination of Bennett, *Mr. Sutton*, who conducted his case in person, stated that he wished to read from the deposition, and to cross-examine the witness, which proceeding was duly objected to. *Mr. Sutton* then proceeded in his endeavor to get the deposition in evidence, stating, in presence of the jury, that "the witness' evidence is so far at variance with his deposition that it is an outrage on the court;" that he had expected it, ever since he had seen the witness in close consultation with Mr. Lusè; that the witness had been "handled" by defendant's claim agent and attorney, and that he (*Sutton*) knew what he was talking about, and that for that reason he was not surprised when the witness came into court and made these statements now. After considerable of this sort of talk on the part of counsel, and a number of reiterations in various ways of the charge that the witness had been tampered with, the court refused to

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allow the deposition to be read, but permitted *Mr. Sutton* to treat the witness as an adverse witness, and to cross-examine him as to what he testified to in his deposition. Whether this was a case where, in the exercise of a sound discretion, the plaintiff should have been allowed to cross-examine his own witness may be doubtful (*Juneau Bank v. McSpedon*, 15 Wis. 629), and we do not deem it incumbent upon us to decide that question. Certain we are, however, that the course of the plaintiff, in making repeated charges that the witness had been corrupted by the defendant's agent, was entirely unjustifiable, and ought, of itself alone, to call for a reversal of the judgment. Such charges, made without the sanction of an oath, are no part of proper legal warfare, and at the same time they are eminently calculated to mislead and prejudice the jury. A case that cannot be won fairly upon the evidence by the use of legal and lawyer-like methods, presumably does not deserve to be won. The same criticism applies to a remark injected into the case at another stage of the trial, to the effect that the company had already settled for the death of the young man. It is true that, upon objection being made to the last-mentioned remark, the court said that it should not be mentioned; but we have found no ruling or caution to the jury with reference to the other remarks, and we cannot but regard them as coming clearly within the rule laid down by this court in the case of *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348.

A suggestion was made that the appeal should be dismissed for the reason that Mr. Luse, who signed the notice of appeal, was not at that time a resident of this state. Mr. Luse's name appears upon the roll of attorneys of this court. There is nothing in this record to show that he has changed his residence, and certainly the court cannot take judicial notice of the fact. What would be the effect of such a change, if it were shown to have taken place, is not determined.

By the Court.— Judgment reversed, and action remanded for a new trial.

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CANDRIAN, Appellant, vs. MILLER, Respondent.

November 17, 1897 — January 11, 1898.

(1-6) *Libel: Mitigating circumstances: Express malice: Several causes of action: Reduction of damages: Character of plaintiff: Evidence: Instructions.* (7) *Appeal: Exceptions.*

1. In an action for the publication of an open letter which was libelous *per se*, the defendant may, under sec. 2678, R. S., set up both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the damages, including, in this case, a newspaper article published by the plaintiff two weeks earlier, to which the alleged libel professed to be a reply.
2. In an action for the publication of an article libelous *per se*, a refusal to instruct that any sum less than $50 would not be substantial damages because it would not carry costs, is *held* not to be erroneous, the question of damages being peculiarly for the jury.
3. In such a case the plaintiff introduced letters written by the defendant for the avowed purpose of proving express malice. Before resting, however, his counsel stated that he desired "the record to show that we make no claim for punitory damages," and then offered another letter of the same general character. The evidence of malice was not formally withdrawn. *Held*, that the admission of evidence in mitigation of damages, against plaintiff's objection that no punitory damages were claimed, was not error.
4. Where an article contains several libelous expressions, each of such expressions is in legal effect a separate cause of action.
5. Under sec. 2678, R. S. (providing that "the defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances"), actual or compensatory damages cannot be reduced by mitigating circumstances.
6. In an action for libel evidence of the plaintiff's bad character with reference to any of the defamatory charges is admissible under a general denial in mitigation of actual damages.
7. A motion for a new trial on the general ground of errors in the instructions is insufficient to bring up for review any specific instruction.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

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The facts are stated in the opinion.

For the appellant there were separate briefs by *Winter, Esch & Winter* and *Higbee & Bunge*, and oral argument by *J. J. Esch* and *G. W. Bunge*. They contended, *inter alia*, that the article published by the plaintiff and pleaded in justification was published on May 14, and defendant's attention was called to it on the same day, while the libel sued on was published on May 28. The defendant testified that he wrote the alleged libel soon after May 14, but that it was not to be published until the 28th and that he might have stopped its publication at any time before that time. He had already answered the publication of May 14 by a letter through the mails, and also by open letter No. 1, published May 21. In his article of May 21 the defendant made all the answer to plaintiff's article that was necessary, and took all the law allowed him in the way of venting any feelings provoked by the publication thereof. There had been time for his blood to cool. *Quinby v. Minnesota Tribune Co.* 38 Minn. 528; *Maynard v. Beardsley*, 7 Wend. 560; *Gould v. Weed*, 12 id. 12; *Sheffill v. Van Deusen*, 15 Gray, 485; *Porter v. Henderson*, 11 Mich. 20; Townshend, Slander & L. § 416; *Lee v. Woolsey*, 19 Johns. 319; *Gronan v. Kukkuck*, 59 Iowa, 18; 1 Suth. Dam. 231; *Keiser v. Smith*, 71 Ala. 481; *Ranyer v. Goodrich*, 17 Wis. 78; 13 Am. & Eng. Ency. of Law, 492. The court should have given the instruction with reference to the effect of the verdict upon costs, as requested. 2 Thompson, Trials, § 2061; *Armstrong v. Pierson*, 8 Iowa, 29; Townshend, Slander & L. § 289, note 4; *Waffle v. Dillenback*, 38 N. Y. 53; *Wakelin v. Morris*, 2 Fost. & F. 26; *Nolton v. Moses*, 3 Barb. 31; *Steketee v. Kimm*, 48 Mich. 322.

For the respondent there was a brief by *Fruit & Brindley* and *C. L. Hood*, and oral argument by *J. J. Fruit* and *Mr. Hood*.

CASSODAY, C. J. This action was commenced June 3, 1896, to recover damages sustained by reason of a libel published

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by the defendant of and concerning the plaintiff, May 28, 1896.

The libel was in the form of an open letter, and, among other things, with appropriate innuendoes and in effect, referred to the plaintiff as being eloquent in calumnies, outrageously malicious allusions, lying and quarreling with acquaintances and neighbors, but equally as "cod-fish mute" when called upon for an answer, explanation, or the truth, quarreling in guttersnipe fashion, and as incapable of thinking at all; that he appears in a very dim, nay perhaps even dirty, light; that he was tricky and stupid; that he was a noble swindling knight,—smooth swindler; that people despise and avoid him; that, even as a newspaper man, he was only an exceedingly wretched example; narrow of intellect, intolerant, and full of spite and prejudices; that he garbles and compiles from other papers whatever is to his liking, and then parades the same before the world as if they were his own intellectual productions, and without giving exchanges credit therefor; that he was a stupid blockhead,—a base dunce and dude; that he had the hide of a rhinoceros, and ought to be whipped with a rhinoceros whip into decency and good manners, and thus drive the fop, dude, and dancing booby out of him; that he was possessed of indescribable vanity; that even his personal appearance carries the irresistible impression of the coxcomb, the dude, the fop; that whoever had business dealing with him discovered only too soon that he was an insipid, superficial individual, whose business methods appear here and there unclean; that such screech owls as he had been characterized as "scabby carrion;" that his idiocy and assumed grandeur and vanity together go to make a fool and eccentric fop of him; that he discloses himself as a positively contemptible slack-tail, full of blemishes, fleas, spots, and tatters. The letter closes with a promise to write two other letters, and with these words: "I am your well-equipped adversary, *James G. Miller*, Attorney."

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The letter is, in part, an answer to an alleged libelous article published by the plaintiff of and concerning the defendant, May 14, 1896. The amended answer of the defendant concedes the publication, and consists of admissions and denials, and sets forth the libelous article so published by the plaintiff, May 14, 1896, and certain prior transactions of the plaintiff, and pleads the matters aforesaid in mitigation of damages, as well as in justification and in defense of the action. At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at one dollar. From the judgment entered thereon the plaintiff brings this appeal.

1. Several phrases of the article complained of were certainly libelous *per se*. *Bradley v. Cramer*, 59 Wis. 311; *Smith v. Utley*, 92 Wis. 136. This being so, the falsity of such portions of the article were presumed, and the malicious intent to injure the plaintiff implied from the mere publication. In such a case, general damages will be presumed from such publication. Odgers, Libel & S. (Bigelow's ed.), 291; *Barr v. Moore*, 87 Pa. St. 385; *Neeb v. Hope*, 111 Pa. St. 145. Such being the nature of the cause of action alleged, we perceive no error in allowing the defendant to answer both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, especially the letter of May 14, 1896. R. S. sec. 2678.

2. Error is assigned because the court refused to instruct the jury to the effect that the plaintiff was entitled to recover substantial damages; that any sum less than $50 would not be substantial damages, because it would not have the effect to carry costs. The giving of costs is a matter regulated by statute. They are a mere incident to the action. The effect of the statutes allowing or disallowing costs is not for the consideration of the jury. The amount of damages in such a case is peculiarly for the jury, and

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they have a broad discretion on the subject. The right of the court, in exercise of a sound discretion, to set aside a verdict as being too large or too small, does not make it proper for the court to dictate the amount of the verdict. There was no error in refusing to charge as requested.

3. Notwithstanding the malice of the defendant was implied by law from the mere publication of the open letter complained of, yet the plaintiff put in evidence three or four other letters, written and caused to be published by the defendant, for the avowed purpose of proving express malice, so as to aggravate and enhance the damages recoverable. Just before resting his case the plaintiff's counsel stated that "I desire the record to show that we make no claim to punitory damages;" and then immediately put in evidence a letter written by the defendant twelve days prior to the libelous article in question, to the effect that a failure to reply, as requested, would "not remain without consequence." Subsequently the plaintiff objected to evidence of matters in mitigation of damages, on the ground that no punitory damages were claimed; but as the plaintiff's evidence of malice had not been withdrawn from the case, and as it was impossible to know at that stage of the trial what the charge of the court on the subject would be, we cannot say that the admission of such evidence was error.

4. As indicated, the article complained of contained several expressions each of which was libelous *per se*. This being so, each of such expressions was, in legal effect, a separate cause of action. As to some of such expressions there does not appear to be any justification in the record. This seems to be conceded in the charge. The court was requested by the plaintiff to instruct the jury, among other things, that, "regardless of the question as to whether you believe that the defendant has proven the truth of the charge that the plaintiff was unclean or dishonest in his business methods, you must find for the plaintiff on the other libelous

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charges in this article, and give to the plaintiff, as damages, such sum as you believe will reasonably compensate him for the injury which he has sustained, and this without regard to the motives which actuated the defendant in writing and publishing the same." The instruction was refused, and the plaintiff excepted. Counsel for the defendant say that the instruction so requested was substantially given in the general charge. On the contrary, after charging the jury that they were "only to consider the actual damages the plaintiff had sustained, if any," and defining such damages, the court charged the jury substantially as follows: "In determining the actual or compensatory damages, if you find the plaintiff has sustained such damages, you have a right to consider the truth of any of the matters charged as defamatory *and any circumstances that go to reduce the extent of his injury;* that is to say, . . . the plaintiff's character with reference to any of the alleged defamatory charges, . . . the article of May 14, 1896, . . . and . . . the circumstances under which the defendant's attention was called to that article, . . . and the condition of mind the defendant was in when he wrote the . . . article of May 28, 1896;" that they ought to consider all of such circumstances in arriving at or helping them to fix the actual damages which the plaintiff had sustained, if any.

The statute cited provides that "the defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances." R. S. sec. 2678. That section was a literal copy of the New York Code (sec. 165), and was first enacted in this state as sec. 71, ch. 120, Laws of 1856, approved October 9th of that year. Two years prior to that enactment it was held by the highest court in New York that, "since the enactment of the Code of Procedure, the defendant, in an

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action for slander or libel, may prove in mitigation of damages facts and circumstances which disprove malice, although they tend to establish the truth of the defamatory charge." *Bush v. Prosser*, 11 N. Y. 347. In that case, W. F. ALLEN, J., speaking for the court, after showing that, by the rules of law as previously established, justification and circumstances in mitigation could not both be pleaded, and that "a plea of justification was conclusive evidence of malice, and that if a party, having alleged the truth of the charge, failed to prove it, the damages were necessarily enhanced by the plea, and that the defendant would be deprived of the benefit of any evidence given under it, tending to prove the truth of the charges, but coming short of a justification, although they showed probable cause and entire good faith on the part of the defendant" (*id.* 353), further said: The section "was not designed to prescribe what might be pleaded in defense of an action for slander, but was enacted to secure the full benefit of the right to plead at all to the defendant, by blotting out the rule of the common law, which attached certain presumptions prejudicial to the defendant to one class of pleas" (*id.* 353). And again: "The object and design of the section, apparent from its terms as well as indicated by the commissioners of the Code in their report, was to remedy this supposed injustice by changing the rule." *Id.* 353, 354. He also said: "The action is vindictive, and the damages are punitive as well as compensatory; and, so far as the *former* are concerned, all evidence tending to throw light upon the *intent and motives* of the defendant, which does not interfere with the established rules of law, may very properly be received." *Id.* 356. To the same effect: *Bisbey v. Shaw*, 12 N. Y. 67; *Hatfield v. Lasher*, 81 N. Y. 246; *Mattice v. Wilcox*, 147 N. Y. 624. In a late case in that state it is expressly held that "matter in mitigation, in disproof of express malice, operates only to prevent recovery of exemplary damages, and is ineffectual to reduce

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damages actually sustained." *Hartman v. Morning Journal Asso.* 46 N. Y. St. Rep. 181.

The construction thus given to the statute in New York, before its adoption here, was expressly sanctioned in this state soon after. *Kennedy v. Holborn*, 16 Wis. 458. COLE, J., speaking for the court, there said: "Indeed, it would be impossible to add anything to what is there said to show the precise mischief intended to be corrected by this legislation. It was to enable the defendant to show, if he could, the truth of the words complained of in justification and defense of the action, and, if he should fail in proving the justification, then that he might give in evidence the mitigating circumstances *tending to rebut the presumption of malice.*" So this court has held, in effect, that the publisher of an article libelous *per se* and not privileged is liable to the injured party for any damage *actually sustained*, even "though the publication was made without any bad motive or malicious intent." *Wilson v. Noonan*, 35 Wis. 321. So it was there, in effect, held that implied malice was as much the subject of disproof as express malice, and that evidence of the absence of bad motive or malicious intent might "be considered by the jury in connection with the question of punitory damages." *Id.* In a later case in this court it was held "that, where the publication is *prima facie* libelous, facts and circumstances tending to overcome or lessen the presumption of malice, if properly pleaded in mitigation of damages, may be proved;" and that where the special verdict finds that the article published was false, but was not published with the intent to injure the plaintiff's feelings and degrade him in the estimation of the public, such verdict did not negative all malice, but merely negatived two elements of express malice, and hence that the exclusion of evidence in mitigation of damages was error. *Eviston v. Cramer*, 54 Wis. 225. See, also, *Reiley v. Timme*, 53 Wis. 63. So, in a recent case, this court has expressly held that "actual

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or compensatory damages for a libel cannot be mitigated by circumstances showing good faith." *Buckstaff v. Hicks*, 94 Wis. 35. See, also, *Adamson v. Raymer*, 94 Wis. 243; *Callahan v. Ingram*, 122 Mo. 355; *Witcher v. Jones* (Com. Pl.), 17 N. Y. Supp. 491.

In a recent case in New York it was held that "where the court in an action for libel had instructed the jury that exemplary damages could not be awarded, it is proper to refuse to charge that 'the publication of other similar articles in other papers immediately prior to the publication of the article complained of is a matter the jury must consider in mitigation of damages,' and 'the fact that the same matter, substantially, was published extensively in the morning papers of the same day is to be considered by the jury in mitigation of damages.'" *Van Ingen v. Mail & Exp. Pub. Co.* (Com. Pl.), 35 N. Y. Supp. 839.

From the authorities cited, it is quite obvious that actual or compensatory damages are not to be reduced by mitigating circumstances,— especially collateral circumstances, as mentioned in the portion of the general charge quoted. It follows that the instruction requested should have been given.

We do not say that the defendant was not at liberty to show that "the plaintiff's character with reference to any of the alleged defamatory charges" was bad; for, as the court properly charged the jury, "in this class of actions the plaintiff's character is always in issue." Such evidence simply goes to the actual damages,— the extent of the injury. Evidence of bad character or reputation, in such cases, has always been admissible under the general issue or general denial, independent of the provision of the Code in question. *B. v. I.* 22 Wis. 372. This is really all that was decided in *Maxwell v. Kennedy*, 50 Wis. 645, cited by counsel. The same justice who wrote the opinion in that case also wrote the opinion in *Plummer v. Johnsen*, 70 Wis. 133, where the

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trial "court instructed the jury, in effect, that, if the plaintiff's general character and reputation were bad, his compensatory damages would be thereby lessened, and should be measured by the injury actually suffered;" and he there said that "the jury were charged that they might measure the damages by the character of the plaintiff. If it was bad, the jury were not limited by any amount exceeding nominal damages." 70 Wis. 134. To the same effect, see *Grace v. Dempsey*, 75 Wis. 324. It is always competent, under proper pleadings, to give in evidence facts which tend to prove or disprove the amount of injury actually sustained.

The charge contains errors against the defendant as well as against the plaintiff; but they are not presented by any specific exception, and hence cannot be considered. The mere fact that one of the grounds upon which the plaintiff moved for a new trial was "errors of the court in the charge to the jury" does not present for consideration any specific error in the charge.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

GARBES, Appellant, vs. ROBERTS, Respondent.

November 17, 1897 — January 11, 1898.

Vendor and purchaser of land: Failure to deliver possession: Rescission: Judgment: Voluntary payment.

1. The purchaser of a farm, having commenced an action to rescind the contract of sale, refused to take possession of the property when it was tendered to him during the months of March and April. Thereupon the vendor, who was a nonresident, for the protection of both parties, let the farm for the season, under an agreement for a fair division of the crops with the person ultimately found entitled thereto. Before the lease expired the action for rescission

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was decided against the purchaser, and he immediately demanded possession. *Held*, that the vendor's inability to deliver possession at that time because of the lease did not authorize a rescission, since the purchaser by his own acts had helped to bring about the existing state of affairs.

2. In an action to recover back the purchase price of the farm on the ground of such failure to deliver possession, the vendor set up a counterclaim for taxes paid by him, which the purchaser had agreed to pay. *Held*, that a judgment offsetting such taxes against the crops was erroneous, the crops being in no sense before the court.

3. Where the vendor under a land contract voluntarily pays taxes which the purchaser had agreed to pay, before the same became delinquent, he cannot recover the amount paid from the latter.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed in part; reversed in part.*

This is an action by the vendee in a contract for the sale of a farm to recover back from the vendor $1,500 paid upon the contract, and the value of nineteen promissory notes given for the balance of the purchase price, on the ground that the vendor had failed to give possession of the farm according to the terms of the contract, and that the vendee had elected to rescind the same. Trial by jury was waived, and the action was tried by the court. The facts were without material dispute, and were, in brief, as follows:

The land contract was made August 12, 1895, and by its terms *Garbes* was to pay $10,500 for the farm, viz., $150 down, $850 November 3, 1895, one note of $500, due April 1, 1896, to be indorsed by Henry Esmueller, without interest, and eighteen notes of $500 each, payable one each year during eighteen consecutive years, the first one being due May 1, 1897. Possession of the farm was to be given October 15, 1895, and the vendee agreed to pay all taxes upon the premises. *Garbes* paid the $150 down at the time of the making of the contract and execution of the notes. When the time came to give possession, viz., October 15, 1895, the

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farm was in possession of a tenant of *Roberts*, who held it under a lease running until the 15th of March, 1896. This tenant refused to vacate the house and farm buildings until the expiration of his lease, but allowed *Garbes* to go on and prepare the farm for the next year's crop, which he did, doing plowing and seeding to the amount of $150 in value, and on the 3d of November he paid to *Roberts* $850 upon the contract. In November and December, 1895, *Garbes* repeatedly demanded possession of the entire farm, and finally, on the 16th of December, 1895, he served a notice rescinding the contract, and demanding return of his purchase money and notes, and, upon *Roberts'* refusal, commenced an action in equity to rescind the contract and have his money and notes returned. This action was begun in December, 1895.

On the 16th of March, 1896, and before said equity action had come to trial, *Roberts* notified *Garbes* that he could have possession of the farm, and repeated such notice several times, the last time being on the 14th of April, when he served a written notice requiring him to take possession within three days, and informing him that, if he did not, he (*Roberts*) would place a competent man on the farm to till and care for it for his (*Garbes'*) benefit. *Garbes* refused to comply, and thereupon, on the 18th of April, *Roberts* placed one Stellah upon the farm, under an agreement to work the same during the year 1896, and at the end of the season to turn over to the party then entitled to the same one third of all crops and one dollar per acre for pasture land, except that the winter wheat already sown was to be divided equally, and Stellah was to quit the farm November 1, 1896. Stellah took possession under the agreement, and proceeded to cultivate the farm.

The equity action for rescission was brought to trial in July, 1896, and on the 8th of that month findings were made, in effect, that *Garbes*, by making his payment of $850,

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and by taking possession of the plow land after October 15, 1895, had waived his right to rescind the contract because of failure to give possession at the time fixed, and awarding him $500, with interest, as damages for defendant's failure to give possession at the time agreed on, which sum (at defendant's option) was to be applied as a payment on the contract, or *Garbes* might surrender in writing his interest in the lands and receive from *Roberts* said sum of $500, and interest from December 16, 1896. Upon this finding judgment was entered on motion of *Garbes'* attorneys, July 10, 1896, adjudging that said damages, amounting to $520, be applied upon and deducted from the first payment thereafter required to be made upon the contract. This judgment was never appealed from, and the damages are set up as a payment on the contract in the complaint in the present action.

On the 15th of July aforesaid, *Garbes* demanded possession of the premises from Stellah, which was refused, and also served on *Roberts*, at his residence at Mankato, Minnesota, a written demand for possession, and notifying him that he should rescind the contract if such possession was not delivered within fifteen days. Possession was not delivered, but on the 25th of July, 1896, *Roberts* delivered to *Garbes* the agreement with Stellah, with an assignment of all rights under it to *Garbes*. On the 17th of August, *Garbes* served notice on *Roberts*, electing to rescind the contract and demanding return of the purchase money and notes, and, such notice not being complied with, he commenced this action. Stellah left the farm, leaving the share of crops thereon agreed to be left, and they are in possession of the defendant, and amount to about $300 in value. *Roberts* paid the taxes for 1895 on the farm, amounting to $71.72, before the same became delinquent, and without plaintiff's request. Upon these facts judgment was rendered that the plaintiff take nothing by his action, but that the defendant be en-

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titled to deduct the sum of $71.72 for taxes paid from the crops on the farm, and that the defendant recover costs. From this judgment plaintiff has appealed.

For the appellant there was a brief by *Higbee & Bunge*, and oral argument by *G. W. Bunge*.

C. L. Hood, for the respondent.

WINSLOW, J. The judgment in the equitable action conclusively establishes the fact, as between the parties, that *Garbes* had waived his right to rescind the contract on account of failure to deliver possession of the farm in October. Such being the fact, he should have taken possession of the farm in March or April, 1896, when it was repeatedly offered to him. Not taking possession at that time, it is difficult to see why *Roberts* did not take a proper and reasonable course in placing the farm in the hands of Stellah for cultivation under an agreement for a fair division of the crops for the benefit of the person who should ultimately prove to be entitled thereto. To leave the farm unoccupied and uncultivated would certainly have been to subject the same to great risk, and would be directly contrary to all principles of good husbandry; to place it in the hands of hired help, without supervision, would have been unquestionably unsatisfactory and unremunerative. Under the peculiar and unexpected circumstances in which *Roberts* was placed, being himself a nonresident, it seems to us that he adopted the only prudent and reasonable course in an honest endeavor to preserve from loss the interest of both himself and *Garbes*. Certainly, he seems to have exercised entire good faith, and, if he erred in judgment (which is not shown), it must be remembered that *Garbes* was at least partially responsible for the situation. Being so responsible, he cannot take advantage of a state of facts which he was largely responsible in bringing about. This action is really an action for money had and received, and such actions are subject in great degree to

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equitable rules, and we conclude that the circuit court was right in holding that he had no right to rescind the contract in July, 1896, because, by his own acts, he had helped to bring about a state of facts upon which he bases his right to rescind.

We do not, see, however, upon what principle the court allowed the counterclaim for taxes paid by *Roberts* against the crops. Such a judgment appears anomalous. The crops were in no sense before the court, and how can a judgment of lien upon them be enforced in this action? Furthermore, the payment seems to have been purely voluntary. The taxes were not delinquent when paid, hence *Roberts* was not obliged to pay them to protect himself, nor did *Garbes* request him to pay them. A man cannot make another his debtor in that way.

By the Court.— So much of the judgment as adjudges the defendant entitled to recover upon his counterclaim is reversed, without costs, and the balance of the judgment is affirmed, and the action is remanded with directions to dismiss the counterclaim. No costs are allowed to either party, save that the appellant is to pay the fees of the clerk of this court and the costs of printing respondent's brief.

LARSON, by guardian *ad litem*, Appellant, vs. THE KNAPP, STOUT & CO. COMPANY, Respondent.

November 19, 1897 — January 11, 1898.

Injury to minor servant: Dangerous machinery: Assumption of risk: Promise to repair.

1. While plaintiff, a minor seventeen years of age, employed to run a lath saw, was attempting to remove with a stick, while the saw was in motion, sawdust which had accumulated in a narrow space

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between the saw and a spout constructed to carry away the refuse, the stick was caught by the saw, and he was injured. It appeared without dispute that plaintiff had worked two years at the same or a similar saw, and that he knew of the danger of the stick being caught upon the revolving saw, and knew that the sawdust could be removed in perfect safety by stopping the saw, as he was entitled to do and had frequently done. *Held*, as matter of law, that he assumed the risk.

2. Where there is both a safe and a dangerous way of doing work about a machine, a promise to repair so as to remove the danger will not relieve an operative from the consequences of assumption of the risk if he deliberately chooses the dangerous way.

APPEAL from a judgment of the circuit court for Dunn county: A. J. VINJE, Judge. *Affirmed.*

Personal injuries. The plaintiff, in June, 1895, was a minor, seventeen years and four months old, and was employed by the defendant in its sawmill at Cedar Falls, operating a lath machine. He had worked for the defendant company four summers in the same mill; the first two summers being employed in laying up bolts or slabs on one side of the lath table for the bolters, and the last two summers in sawing lath at the lath machine. This machine consisted of a long platform or table extending from north to south, at the north end being a circular saw known as the bolting saw, and at the south end, where the plaintiff stood, were two ten-inch circular saws, three eighths of an inch apart, extending up above the table two or three inches, which the plaintiff fed and thus made laths. The power was transmitted to both the bolting saw and the lath saw by a belt from below at about the middle of the table; and at a point midway between the place where the feeder of the bolting saw stood and the plaintiff's place was a lever which operated a clutch pulley which would stop the entire machine at any time. The plaintiff knew of this lever and its use, and had frequently used it, and had a right to use it when necessary. These machines were stopped several

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times every day by reason of running out of material. Under the table, and immediately beneath the lath saws, was a rectangular spout inclosing the saws, and which tapered down to a hole in the floor and was designed to carry off the refuse sawdust and splinters from the lath saws. The north side of this spout, as it tapered towards the floor, came within about three eighths of an inch of the most northerly lath saw, and the evidence shows that this space frequently became clogged with sawdust and splinters, causing the saw to become hot and to cut unevenly. Just south of the two saws, a portion of the top of the table, extending clear across the table, could be removed.

It appears that some two weeks before the 25th of June Mr. Fletcher, who was in charge of the mill, saw that the machine was clogged and the laths were being cut unevenly, and told the plaintiff to clean out the accumulation of débris and keep it clean. The saw was then running, and the plaintiff, without stopping the saw, removed the movable portion of the table, took a piece of lath in his hand, and put his hand down into the spout, and reached around the saws, and poked out the obstruction from the three-eighths inch space. The plaintiff claims that Fletcher saw him clean out the débris in this way, and gave him no caution. He continued to clean the saws in this way frequently. Several days before the accident, while the plaintiff was putting his hand in to clean the saw in this way, the saw caught the stick and knocked it out of his hand. The plaintiff testifies that he then told Mr. Fletcher that he wanted the spout fixed, and Fletcher told him to go back to work, and "we will fix it." He then went back to work, and continued to clean the saw as before, until the 25th of June, when, in making the attempt, the saw caught the stick, and drew his hand against the saw, cutting off his thumb and forefinger. The plaintiff testified that he knew that if the back of a saw in motion came against a stick he was holding, it would be

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apt to jerk it, and for that reason he was just as careful as he could be; and that he knew what the effect of hitting the teeth of that saw with a stick was, that the stick was liable to be thrown or jerked, that he had known it for a long time, that he had seen many sticks thrown by saws about the mill. The plaintiff's claim was that the machine was imperfect and dangerous, in that the space between the spout and the saw was too small and permitted the clogging to take place; that the plaintiff should have been warned of the danger of cleaning the saw in the way he did; and that the defendant had promised to repair the machine and remove the danger.

Upon the close of the plaintiff's case a judgment of nonsuit was rendered, and the plaintiff appealed.

For the appellant there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *C. T. Bundy*. To the point that the question of plaintiff's contributory negligence should have been submitted to the jury, they cited *Stoutenburgh v. Dow, Gilman, Hancock Co.* 82 Iowa, 179; *Barg v. Bousfield*, 65 Minn. 355; *Adams v. Clymer*, 36 Atl. Rep. 1104; *Foley v. California Horseshoe Co.* 115 Cal. 184; *Taylor v. Felsing*, 164 Ill. 331; *Olmscheid v. Nelson-Tenney Lumber Co.* 66 Minn. 61; *O'Connor v. Adams*, 120 Mass. 427; *Luebke v. Berlin Machine Works*, 88 Wis. 442; *Ferriss v. Berlin Machine Works*, 90 id. 541; *Christianson v. Pioneer Furniture Co.* 92 id. 652; *Pier v. C., M. & St. P. R. Co.* 94 id. 359; *Andrews v. C., M. & St. P. R. Co.* 96 id. 348; *Kucera v. Merrill Lumber Co.* 91 id. 637; *Vorbrich v. Geuder & P. Mfg. Co.* 96 id. 277; *Ingerman v. Moore*, 90 Cal. 410; *Neilon v. Marinette & M. Paper Co.* 75 Wis. 579; *Chopin v. Badger Paper Co.* 83 id. 192; *Wolski v. Knapp, Stout & Co. Company*, 90 id. 178.

V. W. James, for the respondent, argued, among other things, that the plaintiff knew every danger attendant upon his employment as well as the defendant's foreman or any-

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body else. Under such circumstances he unquestionably assumed the risk and may be guilty of contributory negligence, notwithstanding the alleged direction to perform the work in the particular manner. *Casey v. C., St. P., M. & O. R. Co.* 90 Wis. 113; *Herold v. Pfister*, 92 id. 417; *Lofdahl v. M., St. P. & S. S. M. R. Co.* 88 id. 421; *Erdman v. Illinois Steel Co.* 95 id. 6; *Dougherty v. West Superior I. & S. Co.* 88 id. 343; *Showalter v. Fairbanks, Morse & Co.* id. 376; *Burnell v. West Side R. Co.* 87 id. 387; *Hoth v. Peters*, 55 id. 405; *Toomey v. Eureka Iron & Steel Works*, 89 Mich. 249; *Reese v. Clark*, 146 Pa. St. 465; *Bradshaw's Adm'r v. L. & M. R. Co.* 21 S. W. Rep. 346; *Wheeler v. Berry*, 95 Mich. 250; *Linch v. Sagamore Mfg. Co.* 143 Mass. 206; *Russell v. Tillotson*, 140 id. 201; *Leary v. B. & A. R. Co.* 139 id. 580; *Keen v. Detroit C. & B. Rolling Mills*, 66 Mich. 277; *Roul v. E. T., V. & G. R. Co.* 85 Ga. 197; *Wormell v. M. C. R. Co.* 79 Me. 397; *Southern Kan. R. Co. v. Moore*, 49 Kan. 616; *Johnson v. Ashland Water Co.* 77 Wis. 51; *Corcoran v. Milwaukee Gas Light Co.* 81 id. 191.

WINSLOW, J. Conceding that the evidence tended to show actionable negligence on the part of the defendant, we are still forced to conclude that the plaintiff assumed the risk, and hence cannot recover. It is true that the plaintiff was a minor, but this fact does not necessarily make the question one for the jury. Where the facts are undisputed and the inferences certain, it may be a question of law for the court. *Casey v. C., St. P., M. & O. R. Co.* 90 Wis. 113; *Herold v. Pfister*, 92 Wis. 417. The facts were undisputed, and the inferences certain, in the present case. The plaintiff had worked at the machine in question, or at a similar one, for two years, and knew all about it. He knew the danger of a stick being caught upon the revolving saw from recent actual experience, and he had also seen such things happen in the mill daily, and he says that on that account he was

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as careful as he could be. He also knew that there was a perfectly safe way by which the saw could be cleaned,— by stopping the machinery,— and he knew that he was entitled to use this method, and had frequently used it. Knowing all these facts, and possessing average intelligence for his age, and having had two years' experience in the business, there is no escape from the conclusion that he assumed the risk.

The promise to repair cannot be relied upon, because the plaintiff was not compelled to use this method, but had a perfectly safe way in which to do his work, of which he knew, but deliberately chose the dangerous way, the dangers of which he knew as well as any one could know.

The nonsuit was properly granted.

By the Court.— Judgment affirmed.

FRIEND BROS. CLOTHING COMPANY, Appellant, vs. HULBERT, Respondent.

November 22, 1897 — January 11, 1898.

Sale of chattels: Rescission: Return of consideration: Application of payments.

1. Although a vendor of chattels must ordinarily return or offer to return the consideration received, so as to put the buyer *in statu quo*, before he can rescind the sale on the ground of fraud, the rule requiring such restoration is, nevertheless, equitable in its nature, and does not require the doing of unreasonable or impossible things, which do not tend to secure equity in the particular transaction.
2. Where sales are made upon credit at different times through a period of several months, each sale will be treated as a separate and distinct transaction, for the purpose of the rule requiring a return of the consideration received as a condition of rescinding the sale.

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3. Where the payments made by the purchaser in such a case did not exceed the amount of the first sale, each payment should be applied upon that purchase, unless at the time it was made it was specifically applied by the purchaser upon some other purchase.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Herman Grotophorst and *Sam'l Rosendale*, for the appellant.

R. D. Evans, for the respondent, contended, *inter alia*, that the modification of the rule requiring a vendor who elects to rescind a contract of sale to rescind *in toto*, adopted in Rhode Island and Nebraska (*Sisson, Potter & Co. v. Hill*, 18 R. I. 212; *Syms v. Benner*, 31 Neb. 593), by which equitable principles have been applied in replevin, is contrary to the great weight of authority. *Sisson, Potter & Co. v. Hill*, 21 L. R. A. 206, note; *Cobb v. Hatfield*, 46 N. Y. (Ann. ed.), 534, note; *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y 75.

CASSODAY, C. J. The complaint alleges, substantially, that the plaintiff is a corporation created and existing under the laws of this state; that Fred, Barney, and Otto Katzky were doing business as copartners, under the firm name of Fred Katzky & Bros., at Baraboo; that March 29, 1895, and at various times after that date and up to November 5, 1895, Katzky Bros. stated to representatives of the plaintiff, and to various mercantile agencies which were established for the purpose of obtaining statements and information from merchants and others desiring to obtain goods on credit, as a basis of such credit, that they (Katzky Bros.) were solvent, and worth $10,000 over and above all their debts and liabilities, and in property not by law exempt from execution; that they knew such statements would come to the knowledge of the plaintiff; that June 14, 1895, Katzky Bros. corroborated such statements, and claimed and represented to the plaintiff that they then were, as they had theretofore

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been, wholly solvent — they well knowing at the time that the previous statements so made by them to the mercantile agencies had come to the knowledge of the plaintiff; that relying upon the truth of such statements, and believing them to be true, and on the faith thereof, and trusting therein, the plaintiff, between March 29 and November 5, 1895, sold and delivered to Katzky Bros. ready-made clothing, at various times between said dates, upon credit, to the amount and value of $9,349.76, of which Katzky Bros. had paid no part, except the sum of $3,752.76, leaving due, unpaid, and owing to the plaintiff therefor the sum of $5,597; that such statements so made by Katzky Bros. were false and untrue, and by them known to be so when made, and that they were so made for the purpose of cheating and defrauding the plaintiff out of the value of the said goods or the greater part thereof, and that the plaintiff thereby was cheated and defrauded; that said Katzky Bros., during all said time, were insolvent; that, upon knowledge of such fraud coming to the plaintiff, it elected to, and did, rescind the sales, and demanded a return of the property, which was refused; that thereupon, and on December 20, 1895, the plaintiff commenced this action to recover the property described, or $5,597, as the value thereof, in case a delivery thereof could not be had, together with damages and costs.

The defendant, as sheriff, justified the seizure of the goods December 16, 1895, under and by virtue of an execution against F. Katzky Bros., and in favor of Marcus J. Katzky, and that he held possession thereof thereunder, and also under and by virtue of two certain attachments against F. Katzky Bros.,—one in favor of J. Emil Dryfoos, and the other in favor of the Straw-Ellsworth Manufacturing Company.

At the close of the testimony, the court granted a nonsuit on the sole ground that the plaintiff had not returned, nor offered to return, the portion of the purchase money paid to

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the plaintiff by F. Katzky Bros. From the judgment entered thereon accordingly the plaintiff brings this appeal.

In view of the rulings of the trial court mentioned, and for the purpose of this appeal, we must assume that there was sufficient evidence to take the case to the jury on the questions of fraud and false representations alleged in the complaint. The first purchase was made March 29, 1895, and amounted to $4,133.20. The amount purchased from that time, to and including August 1, 1895, was only $222.85. The amount purchased in August was $1,964.50. The amount purchased in September was $2,171, and the amount purchased after that time was $858.25, making a total of $9,349.76. The total amount paid and credited during the time (including $244.50 goods taken back, and $416 discount) was only $3,752.50; that is to say, $380.70 less than the first purchase of March 29, 1895. The cash payments were as follows: April 20, 1895, $2,000; June 25, 1895, $800; and November 5, 1895, $500,— making the whole amount of cash paid $3,300. There is evidence tending to prove that the sales of Katzky Bros., during the time, of the goods so purchased of the plaintiff, were $6,674.85; that the goods replevied by the plaintiff, at cost price, were about $6,000; and that their value was from $3,500 to $3,848.75. It is stipulated that the special interest which the defendant, as sheriff, claims in the goods replevied, was $3,445, and their value for all purposes, $4,000. The real question for determination is whether the plaintiff is barred from recovering any portion of the goods in question or their value, by reason of its failure to return or offer to return the $3,300 cash so received. If such are the facts, then it is obvious that, during the time mentioned, Katzky Bros. must have sold of the goods so purchased of the plaintiff to the value of, at least, $3,349.26. Beyond question, a fraudulent sale, although voidable, is not absolutely void. So, as a general rule, it is well established that a party who seeks to rescind a contract

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of sale on the ground of fraud must do so *in toto;* that he cannot affirm it in part, and disaffirm it as to the residue; and hence, in order to rescind in such a case, the vendor must return, or offer to return, the consideration received. *Weed v. Page*, 7 Wis. 503; *Hendricks v. Goodrich*, 15 Wis. 679; *Hollenback v. Shoyer*, 16 Wis. 499; *Grant v. Law*, 29 Wis. 99; *Hyslip v. French*, 52 Wis. 516, 517.

As indicated, we must assume, for the purposes of this case, that each of the several sales made by the plaintiff to Katzky Bros., between April 12, 1895, and November 5, 1895, inclusive, was made upon false representations. While the representations upon which the plaintiff claims to have given credit and made the several sales mentioned are the same, or quite similar, yet the plaintiff seems to be fully justified in contending that each sale so made was a separate and independent transaction. That being so, it is manifest that if there was any sale after the first, upon which Katzky Bros. made no payment, then as to that sale the plaintiff might, in case the evidence should warrant, recover without returning or offering to return the payment or payments received on other sales. Since the aggregate amount paid by Katzky Bros. was less than the amount of their first purchase, we perceive no good reason why all such payments should not be applied upon such first purchase, unless it should be made to appear that such payments, or some of them, were specifically applied by Katzky Bros. upon some other purchase at the time of making such payment. The several sales should be treated as separate and independent transactions. *Costigan v. Hawkins*, 22 Wis. 79; *Manning v. Humphreys*, 3 E. D. Smith, 218; *Miner v. Bradley*, 22 Pick. 457.

The rule requiring such restoration is equitable in its nature, and hence unreasonable or impossible things, which do not tend to secure equity in the particular transaction, are not required. Thus: "A firm of retail dealers by fraudulent representations induced plaintiffs, wholesale dealers, to

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sell them goods. Goods were sold at various dates during the succeeding six months. For about two thirds of the goods notes were given. Some of the earlier notes were paid, but the remaining notes and the book account were not paid. The purchasers of the goods confessed judgments to other creditors, and plaintiffs, having identified certain of the goods levied upon, notified the sheriff that they had rescinded the contract of sale and claimed the goods. On an interpleader, the evidence tended to show that the purchasers had received from customers who had purchased some of the goods more than the amount of the notes paid to plaintiffs. *Held*, that plaintiffs were not bound to refund the amounts of the notes paid to them, and that a verdict and judgment in their favor should be sustained." *Sloane v. Shiffer*, 156 Pa. St. 59. In another case in the same court it has been held that "where goods are sold under fraudulent representations, and are all delivered under one contract of sale, the vendors may rescind the contract without tendering to the vendee the portion of the purchase money paid, if it appears that the value of the goods claimed does not exceed the balance due the vendors." *Schofield v. Shiffer*, 156 Pa. St. 66. To the same effect: *Tootle v. First Nat. Bank*, 34 Neb. 863; *Pearse v. Pettis*, 47 Barb. 276; *Schoonmaker v. Kelly*, 42 Hun, 299; *Montgomery v. Pickering*, 116 Mass. 227; *Sisson, Potter & Co. v. Hill*, 18 R. I. 212. So, it has been held that where the vendee has, by his own wrongful act, put it out of the power of the vendor to place him in *statu quo*, the vendor may rescind the sale without doing so. *Masson v. Bovet*, 1 Denio, 69; *Hammond v. Pennock*, 61 N. Y. 145; *Guckenheimer v. Angevine*, 81 N. Y. 394; *Wilson v. Challis*, 39 Ill. App. 227; *Phenix Iron Works Co. v. McEvony*, 47 Neb. 228; *Warner v. Vallily*, 13 R. I. 483; *Lee v. Simmons*, 65 Wis. 523. So, it has been held that the return of the vendee's note taken by the vendor is not necessarily a condition precedent to such rescission. *Hyland v.*

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Bohn Mfg. Co. 92 Wis. 157; *Nichols v. Michael*, 23 N. Y. 264; *Duval v. Mowry*, 6 R. I. 479; *Manning v. Albee*, 11 Allen, 520.

We have purposely refrained from discussing the facts, so as not to embarrass a new trial.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

KEITH and others, Appellants, vs. ARTHUR, Garnishee, Respondent.

December 10, 1897 — January 11, 1898.

Voluntary assignment: Garnishment: Election of remedies: Estoppel.

An insolvent debtor made a voluntary assignment which was void because of the failure of the assignee to sign the bond. Plaintiffs filed their claim with the assignee without knowing of the defect or making any effort to ascertain their rights. Afterwards a large number of other creditors also filed their claims. Subsequently plaintiffs commenced garnishment proceedings against the assignee, but before the trial thereof the assignee was allowed to sign the bond *nunc pro tunc*. *Held* that, by becoming parties to the assignment proceedings and remaining such for a considerable length of time, the plaintiffs were estopped from maintaining the garnishment action.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

August 23, 1894, C. J. Arthur made an assignment to the garnishee, *J. H. Arthur*, for the benefit of creditors. All the assignment papers were properly executed and filed so as to comply with the statutes of this state respecting such proceedings, except that the assignee, by mistake, failed to sign his bond. He supposed that the statutes had been in all respects complied with, and proceeded in good faith

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to assume and execute the duties of the trust. On the day the assignment was executed the assignee notified plaintiffs, who were foreign creditors, of the making of the assignment. August 26th, thereafter, the statutory notice of the assignment was sent to the plaintiffs. September 6th plaintiffs forwarded proper proof of their claim to the assignee, which proof he filed in the office of the clerk of the circuit court for Dane county, December 8th. September 7th garnishment proceedings were commenced against the assignee by several creditors upon the ground that the assignment was void for the failure to sign the bond, as aforesaid. At the time of forwarding the claim as aforesaid, plaintiffs did not know of the defect in the assignment, in that there was a failure of the assignee to sign the bond. September 12th they were informed of such defect and immediately applied to the assignee by telegraph to return their proof, and also immediately directed the commencement of an action against the assignor for the recovery of their debt, and that the assignee be garnished. Before the commencement of the trial of the garnishment action plaintiffs requested permission of the court to withdraw their proof of claim, which request was not allowed. The trial of other garnishee actions resulted in judgments against the assignee upon the ground that the assignment was void for failure to sign the bond. September 13th the circuit court permitted the bond to be signed *nunc pro tunc*, not, however, to interfere with the rights of parties who had theretofore commenced garnishment actions.

The result of the trial was that the court found as facts the making of the assignment, the failure to sign the bond, the subsequent signing thereof, the filing of the claim by plaintiffs, and the filing of a large number of other claims by creditors, as before stated. As a conclusion of law the court found that the plaintiffs became parties to the assignment by filing their claim, and could not thereafter im-

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peach it; that as to them the assignment was valid notwithstanding the defect in the bond. Judgment was rendered against plaintiffs and in favor of the garnishee for costs accordingly, and plaintiffs appealed.

For the appellants there was a brief by *Luse & Wait*, and oral argument by *L. K. Luse*. They contended, *inter alia*, that knowledge of the facts is as necessary an element in this case to bring about an estoppel as in any other. A reference to the cases cited in *Boynton Furnace Co. v. Sorensen*, 80 Wis. 594, will disclose that they were decided squarely with reference to the knowledge of the parties. See *Cavanagh v. Morrow*, 67 How. Pr. 242; *Estate of Burke*, 1 Parson, Sel. Eq. Cas. (Pa.), 470; Bishop, Insolvent Debtors (3d ed.), § 250; *Van Nest v. Yoe*, 1 Sandf. Ch. 4. See, also, *Talcott v. Hess*, 4 N. Y. St. Rep. 62; *Schofield v. Scott*, 20 id. 815; *Turney v. Van Gelder*, 68 Hun, 481.

For the respondent there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford*.

MARSHALL, J. The delivery of plaintiffs' claim to the assignee constituted a written acceptance of the benefits of the trust. They had an election of remedies. Having exercised such election by accepting the obligation of the assignee to administer the trust under the assignment for their benefit, they thereby waived any and all other remedies inconsistent therewith. This court has so frequently spoken on that subject that there is little, if anything, additional that can be said in regard to it. The principal cases where the matter has been considered are cited in the briefs of counsel. *Littlejohn v. Turner*, 73 Wis. 113; *Lawson v. Stacy*, 82 Wis. 303; *Boynton Furnace Co. v. Sorensen*, 80 Wis. 594. Where the waiver is made with knowledge of the facts, it works an estoppel and cannot be relieved against at all, any more than one can be relieved of the consequences of deliberately, with knowledge of the facts, entering into any other

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contract in writing. But if the position of an accepting beneficiary be otherwise assumed by a creditor to his prejudice, it is unquestionably within the power of the court to relieve him from the situation on a proper showing sufficient to warrant it on some ground of equity; though if the application therefor be delayed till it would work injury to others to grant it, whose condition in that regard may have been influenced by the conduct of the applicant, then it should be denied.

Applying the foregoing to this case, it appears that a large number of creditors had filed their claims after plaintiffs filed theirs. There was a mutual interest on the part of all such creditors to sustain such assignment, and they probably were influenced more or less by the conduct of each other, in accepting the trust. There is nothing to show that plaintiffs made any effort whatever to inform themselves in regard to their rights before filing their claim, while the means of knowledge was open to them. Under such circumstances, especially in view of the legislative and judicial policy of this state to sustain assignments, the court could not properly have relieved the plaintiffs from the acceptance of the trust, for the mere purpose of enabling them to seek a preference over other creditors by attacking the assignment, even if a proper application had been made in the assignment proceedings for such relief before the commencement of this action, which was not the case. The finding and judgment of the circuit court, that plaintiffs were estopped from the commencement and prosecution of the garnishee action by reason of their conduct in becoming parties to the assignment proceedings and remaining such for a considerable length of time, must be sustained.

By the Court.— The judgment of the circuit court is affirmed.

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HALL, Respondent, vs. HALL and wife, imp., Appellants.

December 10, 1897 — January 11, 1898.

Estates of decedents: Judgment: Mistake: Correction of record.

Upon final settlement of the estate of a testator there was no contest or dispute concerning the construction of the will, but it was understood and agreed by counsel for the executors, the guardian *ad litem* for the remainderman, and the county judge that the order assigning the residue should be substantially in the language of the will, and a judgment to that effect was orally announced and rendered; but by inadvertence or mistake the judgment as drawn by the attorneys for the executors and actually signed and entered was substantially different, the life tenant being given more apparent authority with reference to the disposal of the corpus of the estate. *Held*, that the record could be corrected, upon application of the remainderman after the death of the life tenant, so as to conform to the judgment actually pronounced and rendered.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

In 1896 the plaintiff presented to the county court a petition, setting up in effect the following facts:

One George Hall died in Dane county, January 13, 1883, testate. Such proceedings were had that March 16, 1883, the will of the deceased was duly approved and admitted to probate in and by the county court, and *Samuel Hall* and Henry Marsden, of Albion, were duly appointed executors thereof. By the will he gave, devised, and bequeathed to his wife, Sarah Hall, all his personal property for life, with the remainder to his nephew, the plaintiff, son of his brother, *Samuel Hall*, subject to the bequest to his wife's niece, Eunice Noble, of $500, to be paid to her in case she survived his wife. Subject to such bequest, he thereby gave, devised, and bequeathed the use, rent, and profits of all his real estate to his wife, Sarah, to have, hold, and dispose of during

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her life in such manner as she should deem proper, and thereby authorized and empowered her to mortgage, grant, bargain, sell, and convey any and all of said real estate at any time during her life when she deemed it necessary and proper for her to do so, and provided that all mortgages and conveyances by her, executed in due form of law, should have all the force and effect that they would if made by himself. Subject to such provision, he thereby gave, devised, and bequeathed all his real estate which he then had or might thereafter acquire, not disposed of by his wife, to the plaintiff, who was to take the same subject to all liens, mortgages, and incumbrances his wife might impose thereon in her lifetime; and he also gave and bequeathed all other estate that his wife might leave at her decease to the plaintiff, subject to the foregoing provisions.

The executors duly qualified as such. On November 13, 1883, they filed their final account as executors, together with their petition, setting forth that the estate was settled, and praying for judgment adjusting and allowing the accounts and assigning the residue of the estate to the persons entitled thereto. Thereupon an order was made by the court, dated on that day, directing that the accounts be examined and adjusted, and the matters of the petition be decided, at the January term of the county court for 1884, and that notice thereof be given. Such petition for the settlement of the accounts and the assignment of the estate contained no reference to any uncertainty in the meaning of the will, or to a construction thereof, and no prayer for the construction thereof; and the order for the hearing thereof contained no reference to the construction of the will. On January 4, 1884, an order was made by the county court appointing John M. Olin guardian *ad litem* of the plaintiff, who was then a minor, aged about fourteen years, to appear for him and protect his rights and interests in relation to the settlement of and assignment of the residue of the estate. Olin

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on that day filed his consent, in writing, to act as such. On January 4, 1884, a judgment was entered therein to the effect that after paying all expenses, and deducting hay and grain consumed by the widow on the farm, and the furniture, wearing apparel, live stock, and farming implements held by her, they had on hand, in notes and mortgages, $2,175, and cash, $578.34; making in all, $2,753.34. Thereupon it was considered and adjudged that the account of the executors be, and the same was thereby, allowed, as stated, and that all the residue of the personal estate be, and the same was thereby, assigned to said Sarah, pursuant to the provisions of the will, to have, hold, and dispose of, in her lifetime, in such manner as she should see fit; and the remainder was thereby assigned to the plaintiff, subject to the payment to Eunice Noble, in case she survived the widow, of $500; and it was further adjudged that all the use, rents, and profits of the real estate belonging to the estate be, and the same were thereby, assigned to the said Sarah, to have, hold, and dispose of, in her lifetime, in such manner as she should deem proper; and it was further ordered and adjudged that, in case Eunice Noble should survive Sarah, then in that case there should be paid to her, upon the decease of Sarah, $500 out of the estate, and the same was thereby made a lien on the real estate, but to cease and be divested in case she should not so survive; and it was further ordered and adjudged that, subject to the contingent payment of $500 as aforesaid, and subject to the rights of Sarah, mentioned, and subject also to all mortgages, liens, and incumbrances, and to all grants and conveyances the said Sarah might make of, or impose upon, said real estate during her lifetime, the said real estate was thereby assigned to the plaintiff, but he was to take the same subject to all liens, mortgages, and incumbrances which the said Sarah might impose thereon in her lifetime.

At the time of the hearing of the accounts and the peti-

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tion for the settlement thereof, and before the entry of said judgment, the question as to what was the true intent and meaning of the will was brought up between the court, counsel, and guardian *ad litem*, and, without arriving at any conclusion on that subject, it was decided that such judgment should be so framed as to express the language of the will; and the court thereupon rendered and orally pronounced judgment settling the accounts of the executors in the manner stated, and assigned the residue of the estate in the language of the will, substantially; and it was alleged that it was not the intention of the county court, in the rendition of such judgment, nor of the executors, nor of their counsel, nor of the guardian *ad litem*, that such judgment should in any manner define the meaning of the provisions of the will, but that such judgment should state the language of the last will and testament, leaving the construction thereof open for further adjudication in case any question should ever arise with respect to the true intent and meaning thereof, and that the entry of judgment in language different from the judgment actually pronounced and rendered orally by the court was a mistake upon the part of the attorney for the executors, who drafted the judgment; and that, at the time of signing and entry of judgment, it was understood by the court, the guardian *ad litem*, the executors, and their attorney, that such judgment, as drawn and entered, in all respects conformed to the judgment as actually pronounced, and fully expressed all of the material language of such last will and testament.

Said Sarah Hall afterwards became Sarah Gillett, and died September 4, 1895. Up to the time of her death she used and enjoyed all the residue of the personal estate, and all of the real estate, except as hereinafter stated. On July 30, 1889, the said Sarah, without any consideration therefor, and by undue influence, and when she was mentally incompetent to do business, conveyed by warranty deed a large

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portion of the real estate in question, of the value of several thousand dollars, to *Samuel Hall*, who took and recorded the same with full knowledge of the rights of the widow under the will. On September 12, 1890, the said Sarah, without any consideration therefor, conveyed by warranty deed, reciting a consideration of $4,000, a large portion of the other real estate in question to one Thomas North, who received and recorded the same with full knowledge of her rights under the will. North gave back an instrument in writing in respect to the disposition and proceeds of the land. On April 25, 1885, the said Sarah, without any consideration, conveyed to the Methodist Episcopal Church four acres of the other lands in question, and the church took and recorded the conveyance with full knowledge of the rights of said Sarah under the will. Sarah died testate, and her last will and testament was, November 6, 1895, admitted to probate, and Thomas North was appointed sole executor thereof, and duly qualified as such. Several of the legatees named in her will were represented by an attorney residing in Madison; others were residents of Dane and Jefferson counties. Such executor, North, had imposed no liens upon, and made no conveyance of, any of the real estate derived from George Hall, deceased.

On October 12, 1895, an action of ejectment was commenced by the plaintiff in the circuit court against *Samuel Hall* and wife for the recovery of the land so conveyed to him; and October 25, 1895, the plaintiff commenced an action against Thomas North and *Samuel Hall* for the recovery of the land so conveyed to North; both actions being then pending. It was further alleged that it did not come to the attention of the plaintiff's attorneys until March 1, 1896, that there was a discrepancy between the provisions of the will of George Hall and the provisions of such judgment so entered, assigning and distributing the estate of George Hall; that the plaintiff had no knowledge of such discrepancy until March 6, 1896, when his attention was

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called to the same by his attorneys; that he had long been familiar with the terms of the will of George Hall, deceased, and had always understood that the judgment entered in the settlement of his estate followed the terms of the will, and that his rights in and to the estate of George Hall were fully protected by the judgment; that, as Sarah had an estate for life, there was no occasion for him to investigate the matter until her death; and that no rights had become vested to the prejudice of the granting of the prayer of the petition.

Wherefore the plaintiff prayed that such mistake in the entry of the judgment of January 4, 1884, be corrected so that the judgment should conform to the judgment actually rendered and pronounced by the court as stated, etc.

Thereupon, *Samuel Hall* and wife moved the court to dismiss the petition for the reason that it did not state facts sufficient to constitute a cause of action, or to entitle the petitioner to the remedy demanded, or to any remedy whatsoever, and for other reasons. An order was made by the county court, overruling such motion of *Samuel Hall* and wife, and deciding the issues raised by the answer of other parties in favor of the plaintiff, and an appeal was taken to the circuit court from such order; and, upon hearing such appeal, it was ordered that the motion of *Samuel Hall* and wife to dismiss the petition be, and the same was thereby, overruled and denied, and that the general demurrer so contained in the answer of the other parties to the petition be, and the same was thereby, overruled. From such part of that order as denies and overrules the motion of *Samuel Hall* and wife to dismiss the petition for the correction of the final judgment entered in the matter of the estate of George Hall, deceased, *Samuel Hall* and wife bring this appeal.

For the appellants there was a brief by *R. M. La Follette* and *G. E. Roe*, and oral argument by *Mr. Roe*.

For the respondent there was a brief by *Olin & Butler*, and oral argument by *H. L. Butler*.

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CASSODAY, C. J. For the purposes of this appeal we shall assume that the will of George Hall, deceased, only gave to his widow, Sarah, a life estate in his property, whether real or personal, and that, subject to such life estate and a bequest mentioned, he thereby gave the remainder of his estate, both real and personal, to his nephew, the petitioner and plaintiff herein. That will was admitted to probate March 6, 1883. Such probate of the will was "conclusive as to its due execution." R. S. sec. 2294. The statute provides that after the payment of the debts, funeral charges, and all expenses, and certain allowances, "the county court shall, by an order or judgment, assign the residue of the estate, if any, to such other persons *as are by law* entitled to the same. In such order or judgment, the court shall name the persons and the part to which each shall be entitled. Such persons shall have the right to recover their respective shares from the executor or administrator, or from any person having the same." R. S. sec. 3940. "The statute gives the county court, on final settlement of the estate, ample authority to assign the residue to such persons as are by law entitled to the same. . . . The statute manifestly intends that the order of assignment shall operate to transfer the legal title of the personal property to the persons therein named. It has in law really the same effect as an order of distribution." *Ford v. Smith*, 60 Wis. 225. In fact, it seems to be the way especially provided by statute for a legatee or heir at law to acquire title to personal property. The legal title to such property, upon the death of the owner, goes to the executor or administrator. "In any case," said RYAN, C. J., "when title to personalty comes to legatee or distributee, it comes from the executor or administrator, not from the testator or ancestor." *Estate of Kirkendall*, 43 Wis. 179; *Murphy v. Hanrahan*, 50 Wis. 490; *Marshall v. Pinkham*, 52 Wis. 573; *Melms v. Pfister*, 59 Wis. 192; *Miller v. Tracy*, 86 Wis. 333.

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Upon the record presented, we must assume that the facts stated in the petition are all true and can be established by competent evidence. This being so, it is manifest that at the time of settling the estate there was no contest nor dispute about the true construction of the will; that it was agreed and understood by counsel for the executors, the guardian *ad litem* for the plaintiff, and the judge of the county court, that the order or judgment assigning the property as provided by the statute cited should be substantially in the language of the will; and that the same was so orally announced and rendered, but that by some inadvertence, misconception, or mistake, the order and judgment, as drawn by the attorney for the executors and actually signed and entered, were substantially different, and gave the widow at least apparent authority to dispose of the whole estate, regardless of her necessities or comfort. The plaintiff at that time was only fourteen years of age. He learned that he was, under the will, only entitled to what remained after the death of the widow. She did not die until September 4, 1895. Assuming the facts to be as alleged, we are constrained to hold that they authorize the correction of the order and judgment so that the same will conform to the one actually pronounced and rendered. This ruling is supported by numerous adjudications of this court. *Estate of Leavens*, 65 Wis. 440; *Beem v. Kimberly*, 72 Wis. 344; *Estate of O'Neill*, 90 Wis. 480. Especially should this be so as to the real estate. The statute provides that, upon a will being admitted to probate, a duly attested copy thereof, and of the probate thereof, may be recorded in the register's office, as a muniment of title of the lands, or any interest therein, thereby devised. R. S. sec. 2296. The statute also provides that "every devise of land in any will shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate." R. S. sec. 2278.

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Under this statute this court has repeatedly held that a residuary devisee takes at once, on the death of the testator, all real estate devised to him, subject only to the intervening life estate. *In re Estate of Pierce*, 56 Wis. 560; *Scott v. West*, 63 Wis. 570; *Prickett v. Muck*, 74 Wis. 205; *Hiles v. Atlee*, 90 Wis. 72. Whether title to land so vested in a devisee by the plain and unambiguous language of a will can be subsequently divested by an order of the county court, under sec. 3940, R. S., is a question not necessarily involved, and upon which we express no opinion. See *Ruth v. Oberbrunner*, 40 Wis. 238; *Appeal of Schæffner*, 41 Wis. 260; *Jones v. Roberts*, 84 Wis. 471; *Will of Hess*, 97 Wis. 244.

By the Court.— The order of the circuit court is affirmed.

REOCH, Respondent, vs. REOCH, Appellant.

December 10, 1897 — January 11, 1898.

Vendor and purchaser of land: Agreement to support: Rescission: Sufficiency of evidence.

In an action by an aged person to rescind a conveyance of land made to his son in consideration of an agreement to pay a certain annuity and to furnish living rooms and provisions for himself and wife during their lives, findings of the trial court that there had been a substantial breach of the agreement on the part of the defendant, entitling the plaintiff to the relief asked, are *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The facts are stated in the opinion.

For the appellant there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford.*

G. S. Martin, for the respondent.

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WINSLOW, J. This is an action in equity, commenced in December, 1896, by an aged father against his son, to rescind a conveyance of real estate. The conveyance was a voluntary one, made January 29, 1894, with an expressed consideration in the deed of $2,500, but really in consideration only of a written contract simultaneously made by the son agreeing to pay his father $60 per year besides furnishing provisions for the subsistence of his father and mother and certain rooms for their living during their lives in the dwelling house situated upon the land. There is no dispute as to the fact that the son failed to pay the money annuity, and also failed to furnish provisions and house room after the accidental destruction of the dwelling house by fire September 23, 1896; but it was claimed by the defendant that there was an oral arrangement made between himself and his father to the effect that he was not to pay the $60 annuity until he had paid up a mortgage of $400 on the farm, or rather, perhaps, that he was to pay the annuity by making payments upon the mortgage, which he claimed he had done. Defendant also claimed that after the fire which destroyed the house and furniture there were circumstances which, in equity, excused him for his failure to furnish provisions and house room during the time preceding the commencement of the action, and that he was preparing to perform his contract duty as rapidly as possible. The circuit court found against the defendant to the effect that there was no parol contract, and that the defendant had substantially breached the written contract as claimed by the plaintiff, and hence that the plaintiff was entitled to rescission thereof.

The findings of fact are supported by sufficient evidence, and upon familiar principles we cannot disturb them. They bring the case within the rule laid down in *Bogie v. Bogie*, 41 Wis. 209, and followed in numerous cases since that case, and justified the court in rescinding the original conveyance.

By the Court.— Judgment affirmed.

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LEWIS, Respondent, vs. THE AMERICAN SAVINGS & LOAN ASSOCIATION and others, Respondents, and HALE, Receiver, Appellant.

December 11, 1897—January 11, 1898.

Foreign building and loan associations: Deposit of securities with state treasurer: Ultra vires: *Application of proceeds after insolvency: Receivers: Constitutional law: Waiver.*

1. The directors of a foreign building and loan association constituted the state treasurer a depository "for the purpose of temporary convenience in complying with the laws of Wisconsin in regard to the deposit of securities," and resolved to "comply with the Wisconsin law as soon as possible." Shortly thereafter officers of the association deposited with said treasurer over $100,000 of its securities, and the association received a license to do business in this state. Secs. 2014*a*, 2014*b*, S. & B. Ann. Stats., under which the deposit was made, provided that said treasurer should hold the securities so deposited in trust until all shares held by residents of this state had been fully redeemed, and until the contracts and obligations of the association to persons and members residing in this state had been fully performed and discharged. When the first deposit was made the articles of incorporation of the association authorized the directors to dispose of its mortgages as provided by the by-laws, but no by-law on that subject had been passed. Within a few months the articles were amended so as to prohibit the association from disposing of its mortgages. Said articles also provided that the directors might enter into such contracts and agreements and appoint such agents as they may deem for the best interest of its affairs. The statutes of its domicile authorized such associations to deposit their securities in other states for the purpose of obtaining permission to enter and do business therein, and contained provisions regulating such transfers, apparently designed to facilitate the convenient using and tracing of the securities deposited for that purpose. The deposits were changed or renewed from time to time as occasion required, and a new license granted from year to year. The association became insolvent, and a receiver was appointed for it in the state of its domicile. Thereafter plaintiff, a resident shareholder, procured the appointment of a receiver in this state for the purpose of sequestrating the securities deposited with the state treasurer and

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distributing the proceeds among resident shareholders. To this action the first-mentioned receiver was made a party, and he appeared and claimed the securities. *Held:*

(1) That the securities would be presumed to have been deposited in a *bona fide* attempt on the part of the association to comply with the laws of this state.

(2) That the failure of the association to comply with the statutory provisions of the state of its domicile in making such deposit did not render the transfer void, compliance with such provisions having been intended as a matter of local administration merely, and not as a condition precedent to the right to make it.

(3) That such deposit was within the lawful power of the association as represented by its directors, and the action of the directors in making it was binding upon the association and all its members, to the extent and according to the terms of the statute under which it was made.

(4) That the receiver appointed in this state was entitled to retain and sell or collect the securities, and apply the proceeds to the redemption in full of all shares held by residents of this state and to the performance and discharge of all the association's contracts and obligations to members and persons residing herein, the residue if any to be turned over to the foreign receiver.

(5) That the corporation and its stockholders had waived the right to question the validity of the trust, or the constitutionality of secs. 2014*a*, 2014*b*, S. & B. Ann. Stats., on the ground that they impaired the obligation of contracts, even though in case of insolvency a preference was thereby secured to resident shareholders.

2. The legislature has power to pass laws for the protection of its citizens against irresponsible foreign corporations by requiring them, as a condition precedent to transacting business in this state, to deposit securities in trust for the redemption of their obligations to persons residing herein.

APPEALS from orders of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The American Building & Loan Association was incorporated and organized April 15, 1887, under and by virtue of the laws of Minnesota, as a building and loan association, having its principal office and place of business at Minneapolis, Minnesota; and it continued to transact its corporate business there until 1893, when its corporate name was

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changed to that of the *American Savings & Loan Association.* The general nature of its business was declared to be "to assist its members in saving and investing money, and in buying and improving real estate, and in procuring money for other purposes, by loaning or advancing under the mutual building society plan, to such of them as might desire to anticipate the ultimate value of their shares, funds accumulated from the monthly contribution of its stockholders, and also such other funds as may from time to time come into its hands." The government of the corporation and the management of its affairs was vested in a board of seven directors, elected by the stockholders. Membership was acquired by taking stock in the company and paying the prescribed admission fee. The directors were authorized "to enter into such contracts and agreements, and appoint such agents for its business management, as they may deem for the best interest of its affairs;" and the directors "might sell and dispose of the mortgages held by the corporation whenever they might deem best, and *as provided by the by-laws.*" No by-laws were ever passed on this subject. July 11, 1889, the articles of incorporation were amended so as to provide that "the board of directors shall not sell or dispose of any of the mortgages held or owned by this corporation."

The principal question presented by the appeals is as to the construction, validity, and effect of the law of Wisconsin requiring foreign mutual building and loan associations to make a deposit of securities of the value of $100,000 with the state treasurer of Wisconsin as a condition upon which such corporations might receive a license from and do business in the state. The statute (S. & B. Ann. Stats. secs. 2014*a*, 2014*b*) provides that "no foreign building and loan association . . . shall issue its shares, receive moneys or transact any business in this state unless such association shall have and keep on deposit with the state treasurer of Wisconsin, in trust, for the benefit and security of all its members

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in this state, the securities of the actual cash value of $100,000 of the kind mentioned in section 2 of this act; to be approved and accepted by said state treasurer, and held in trust as aforesaid, until all shares of such association held by residents of this state shall have been fully redeemed and paid off by such association, and until its contracts and obligations to persons and members residing in this state shall have been fully performed and discharged." And it was provided that "if any securities on deposit, as provided in this act, are wholly or partially extinguished by payments on the same or otherwise, or such securities depreciate in value for any cause, new securities must be added, so that the deposit may at all times be kept good and of the value of $100,000."

The defendant association was doing business in this state from the time of the passage of the above act, having 246 members in Wisconsin, 162 of whom became such prior to the date on which the law went into force, to wit, April 19, 1889. The plaintiff, *Lewis*, a resident of Wisconsin, the holder of five shares of stock, upon which $243 had been paid, alleging that there are a large number of residents and citizens of the state of Wisconsin legal members, owning and holding stock, in the defendant association, whose names he was unable to get, or their post-office address, charged that the defendant association was insolvent; that a large part of its assets had been improvidently invested and squandered, and that, on the application of a creditor or creditors thereof residing in Minnesota, *William D. Hale*, the appellant, had been appointed receiver of all the property of the defendant association by the courts of Minnesota, in proceedings initiated therein; that, under the laws of Wisconsin, the defendant was entitled to withdraw all the securities deposited with the state treasurer, and substitute other and similar securities therefor, and that, during the year then passed, the defendant association had withdrawn a large portion of the securities theretofore duly

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deposited with the state treasurer of Wisconsin, and substituted in their stead other securities; that such securities so deposited consist in large part of mortgages upon real estate, which are likely to depreciate in value unless enforced according to law, and that the only property of said association in Wisconsin was the securities aforesaid, from which, if not preserved and properly cared for and converted into cash, it would be impossible for resident members of said association to recover back moneys paid into said association; that it was necessary for the protection of the rights of the plaintiff, and of the members and stockholders in said defendant association resident in the state of Wisconsin, that a receiver for the defendant association in Wisconsin should be appointed, in order to ascertain all of the members and stockholders in said association residing in Wisconsin and the amount of their respective claims, and to convert into money the securities so deposited for their protection, and distribute the same to such persons as may be entitled thereto, under the direction and supervision of the court; and an injunction was sought restraining the defendant *Peterson*, as state treasurer, from in any manner parting with the custody and control of said securities, or permitting any withdrawal or substitution of the same. Judgment was prayed that said securities so held be sequestrated and distributed among the members and stockholders of said association who are residents of the state of Wisconsin, including the plaintiff, according to law; that a receiver or receivers, to take charge thereof and convert the same into money, with the usual powers and authority, be appointed. An injunction restraining and enjoining all persons from proceeding in any manner or way to obtain a lien on said securities, and from in any manner interfering with or intermeddling with the same, was prayed for; and that the court direct notice to be given, as it might deem proper, requiring all members and stockholders of said association who are residents of the

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state of Wisconsin to submit their claims and become parties to the action, within such reasonable time as might be fixed by the court; and for such other and further relief, etc.

In addition to these facts, it appeared from the pleadings that some time prior to May 10, 1889, the defendant association deposited with the state treasurer of the state of Wisconsin, in trust for the benefit and security of all its members in that state, securities consisting of mortgages taken by it in the course of its business, to the actual cash value of $100,000, which were duly approved and accepted by such treasurer, and which had since been held in trust by him and his successors in office, under the laws of this state relating to foreign building and loan associations, by which the state treasurers are required to hold such securities until all shares of stock in said association shall have been fully redeemed and paid off by the defendant association, and until all contracts and obligations of the defendant association to members and persons residing in the state of Wisconsin shall have been fully performed and discharged; that the defendant *Peterson*, as such state treasurer, holds said securities in his custody under said trust to the face value of $113,891.80.

The appellant, *William D. Hale*, who had been appointed by the district court of Hennepin county receiver for said association, petitioned the court to be made a defendant in the action in the circuit court for Dane county; and it was ordered accordingly, and he interposed an answer and counterclaim, in which he admitted that the association was duly licensed by the state of Wisconsin to do business in said state in the year 1889, which said license was continued from time to time thereafter until the 1st day of January, 1894. The plaintiff and the defendant *S. A. Peterson*, as treasurer, etc., and *M. C. Clarke*, the receiver appointed by the circuit court for Dane county, Wisconsin, demurred to said answer and

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counterclaim. Orders were entered sustaining the demurrers, from which the defendant *William D. Hale*, the receiver appointed by the Minnesota court, appealed.

The board of directors of the defendant association passed a resolution May 1, 1889, as follows: "Resolved, that the state treasurer of Wisconsin be made a depository of the association for temporary convenience in complying with the law of Wisconsin in regard to the deposit of securities, $100,000. Also, resolved, that the association comply with the Wisconsin law as soon as possible."

The counterclaim alleged:

(1) That the mortgages belonging to the *American Savings & Loan Association* in the possession of *S. A. Peterson*, state treasurer, at the time of making and filing plaintiff's complaint aggregated in value the sum of $145,234. That prior to the 11th of July, 1889, there was delivered to said *Peterson*, as such treasurer, mortgages of said association aggregating in value the sum of $103,060, of which there remained in his hands at the time of making and filing the plaintiff's complaint, as a part of the mortgages first above stated, mortgages aggregating in value the sum of $20,784; and between July 11, 1889, and the 1st of January, 1894, there were, of the mortgages above stated as in the possession of said state treasurer at the time of making and filing the complaint, delivered to him, at various times, mortgages aggregating $80,850; and after January 1, 1894, there was delivered to him the remainder of said mortgages, which were in his possession at the time of the making and filing of said complaint, aggregating in value the sum of $43,600. That, of the mortgages delivered to him subsequent to the 11th day of July, 1889, a large part thereof were delivered to him in lieu of mortgages in his possession prior to said date, which had been by him surrendered to said association, and the remainder thereof were delivered to him as an addition to those delivered prior to that date.

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(2) That all of said mortgages are regular building and loan association mortgages, made and executed by shareholders and members of said association to secure the payment by said members of their regular instalments of dues upon their stock, upon which said stock they had been granted an advancement or loan, and to secure the payment of the amount of such loan, and that they were non-negotiable, and could not be transferred by said association.

(3) That, being a mutual building and loan association, it had no power or authority at any time to pledge, transfer, assign, sell, or dispose of any of its mortgages; and that none of said mortgages were deposited with said state treasurer by said association, but were given and delivered to him by officers and employees of said association, who were not authorized by said association to so deliver the same; and that they kept in the books of said association a statement or account of said mortgages so delivered to said treasurer.

(4) That said mortgages, and each of them, held by the state treasurer at the time of making and filing the complaint, *were held by him wrongfully, and without right or authority of law for said possession;* that the shareholders had no knowledge whatever of the delivery of said mortgages, nor did they at any time consent thereto or acquiesce therein; that the only action ever taken by said association relative to making a deposit with the state treasurer of Wisconsin was taken by its board of directors on the 1st of May, 1889, at a call meeting of said board, as hereinbefore stated. That the entire number of shareholders residing in Wisconsin when the action was commenced was 246, 162 of which had become such prior to the time when the Wisconsin statute took effect.

(5) That the Wisconsin shareholders, on becoming members, etc., subscribed for their shares of stock in the same manner, and received like certificates therefor, as did all the other shareholders of said association, wheresoever residing;

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and that said association was a mutual corporation; and that each shareholder therein, including the plaintiff and "all the other shareholders in Wisconsin, enjoyed and were subject to like rights, privileges, immunities, and liabilities" that other members enjoyed.

(6) That, under its articles of incorporation, none of the shareholders of the association did or could have higher or superior rights than those enjoyed by all; that, at the date of appellant's appointment, it had shareholders in thirty-five states, owned real estate in nineteen states, and held mortgages on real estate in twenty-nine states.

(7) That the association had violated certain laws of the state of Minnesota, had become insolvent, and incapable of effectuating the object for which it was organized and created, and incapable of carrying out its contracts and obligations; that the appellant, *William D. Hale*, was duly appointed, pursuant to the statutes of Minnesota as fully set forth, by the district court of Hennepin county, general receiver of such association, in an action wherein the state of Minnesota, on the relation of its attorney general, was plaintiff, and said association was defendant; and that the order appointing him required him to take charge of all the property and effects of such association, to collect, sue for, and recover all debts, dues, and demands that were due said association, and to manage and administer all the affairs of said association under the direction of said court. That, pursuant to said order and appointment, the said association executed and delivered to the receiver, *William D. Hale*, deeds of all the real estate owned by it, and due and sufficient assignments of all its property, including said mortgages herein referred to as being in the possession of said *Peterson*, as treasurer of the state of Wisconsin, on the 14th day of January, 1896.

(8) That *M. C. Clarke*, on the 5th of February, 1896, was, by the order of the circuit court of Wisconsin for Dane

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county, appointed receiver of said association for the state of Wisconsin; and the defendant *S. A. Peterson*, state treasurer, was ordered and directed to turn over all the said mortgages referred to in the plaintiff's complaint, and specified in the answer and counterclaim, to said *Clarke*, as such receiver; and that the said *Peterson* had turned over and delivered the same accordingly; and that said *Clarke* was proceeding to collect the same, and would, unless interfered with by the court, distribute the proceeds of the same to the shareholders resident in Wisconsin, thereby giving to said Wisconsin shareholders a preference over the other shareholders of said association.

(9) That the assets of the association are not sufficient to pay to all its shareholders dollar for dollar of the amount which they had paid in or any other or greater sum than forty per cent. thereof; that if said *Clarke*, acting as receiver, should collect said moneys, and distribute the proceeds thereof to the Wisconsin shareholders, they would receive dollar for dollar of the amount they paid in to said association, and thereby be constituted a preferred class of shareholders, against equity and good conscience, and contrary to the purposes of said association as defined by its articles of incorporation, by-laws, and contracts for membership with its shareholders; and, finally, that the law under which it is alleged said mortgages were deposited was intended to protect said Wisconsin shareholders in all their rights growing out of their membership in said association, and not for the purpose of extending, altering, or changing said rights; that the purpose for which any deposit, made by said association with the said state treasurer under said law, was made terminated and was at an end when said association became insolvent and incapable of carrying out its contracts and effectuating the purposes of its being.

The defendant prayed that the court might, by its decree, direct said *Clarke*, as such receiver, to turn over and deliver

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said mortgages so held by him to said *William D. Hale*, to be by him collected, and the proceeds equitably distributed to all the shareholders, wherever residing, and for general relief.

Eugene G. Hay, for the appellant, contended, *inter alia*, that absolute mutuality of interest is the foundation of all building and loan associations. Every shareholder maintains a contractual relation with the association, which, in the nature of things, is a contractual relation with every other shareholder. The certificate of stock which he received was the written evidence of that contract. Each shareholder, upon becoming a member of the association, agreed with each other shareholder that he would share with him equally the losses of the common enterprise. Each shareholder, upon accepting his certificate of stock, agreed that he would be a mutual participant in the fortunes of the association, whether they were good or bad. *Towle v. Am. B., L. & I. Co.* 60 Fed. Rep. 131; *Strohen v. Franklin S. F. & L. Asso.* 115 Pa. St. 273; *Security Loan Asso. v. Lake*, 69 Ala. 456, 461; *Knutson v. N. W. L. & B. Asso.* 69 N. W. Rep. 889; *Eversmann v. Schmitt*, 53 Ohio St. 174; *Price v. Kendall*, 14 Tex. Civ. App. 26; *Rogers v. Raines*, 38 S. W. Rep. 483; *Taylor v. Life Asso. of Am.* 13 Fed. Rep. 493; *Towle v. Am. B. & L. Asso.* 75 id. 938; Endlich, Building Associations (2d ed.), §§ 121–123, 514, 523, 524, *et seq.* Sec. 2014*a*, S. & B. Ann. Stats., is intended to insure to Wisconsin shareholders their contractual rights, not to change or enlarge them. Under his contract with the association the Wisconsin shareholder was to be treated just as the shareholder in any other state. He was to receive his proportionate share of the assets, no more, no less. If this law is interpreted as giving him a larger share of the assets of the association when it becomes insolvent, it operates to enlarge his rights, changes his contract, and impairs its obligations. *Taylor v. Life Asso. of Am.* 13 Fed. Rep. 493; *Run-*

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del v. Life Asso. of Am. 10 id. 720; *Davis v. Life Asso. of Am.* 11 id. 782; *Parsons v. Charter Oak L. Ins. Co.* 31 id. 305; *Relfe v. Rundle*, 103 U. S. 222; *Bockover v. Life Asso. of Am.* 77 Va. 85; Reno, Non Residents, § 164. The proper construction of this law is that the deposit of the mortgages with the state treasurer was made only to enable the Wisconsin shareholders to enforce such rights as they might have in the association growing out of their contractual relation. The insolvency of the association and the appointment of the receiver abrogated these contracts; hence, the purpose for which the deposit was made is at an end, and the mortgages should be turned over to the domiciliary receiver and distributed equitably among all the shareholders. Any other construction would defeat the very purpose of that principle of equity which authorizes a court to take charge of an insolvent estate. *Towle v. Am. B. & L. Asso.* 75 Fed. Rep. 938; *Pittsburg & S. R. Co. v. Allegheny Co.* 79 Pa. St. 214; *Wright v. Lee*, 2 S. Dak. 596; *S. C.* 4 id. 237; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67; *Washburn Mill Co. v. Bartlett*, 3 N. Dak. 138; *Toledo T. & L. Co. v. Thomas*, 33 W. Va. 566; *American B. & L. Asso. v. Rainbolt*, 48 Neb. 434; Morawetz, Priv. Corp. (2d ed.), § 665; *Rogers v. Hargo*, 92 Tenn. 35. Sec. 2014*a* impairs the obligations of contracts. The Minnesota law under which the association was organized authorized the deposit of securities in a foreign state when required by the laws of such state. In the same law such associations were forbidden to issue or create preferred stock. The legislature could not have intended to authorize the association to make a deposit which would create preferred stock, and at the same time and in the same act forbid it to create preferred stock. It is clear, therefore, that the interpretation placed upon the Wisconsin statute was that contended for by appellant. Otherwise the Minnesota law was itself in conflict with the constitution, in that it authorized a corporation of its creation to do

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that which violates its contracts and renders it impossible for it to fulfill the purpose of its creation by destroying the mutual relation of its shareholders, which is the essence of its being. *Fletcher v. Peck*, 6 Cranch, 87; *Sturges v. Crowninshield*, 4 Wheat. 122; *Dartmouth College v. Woodward*, id. 518; *Green v. Biddle*, 8 Wheat. 1; *Ogden v. Saunders*, 12 id. 213; *Bronson v. Kinzie*, 1 How. 311; *Van Hoffman v. Quincy*, 4 Wall. 535; *Fisher v. Patton*, 134 Mo. 32; Cooley, Const. Lim. (5th ed.), 331 *et seq.*; *Relfe v. Rundle*, 103 U. S. 222; *Canada S. R. Co. v. Gebhard*, 109 id. 527.

For the respondents there was a brief by *Lewis, Briggs & Dudgeon*, attorneys for *Clarke*, and the *Attorney General*, attorney for *Peterson*, and oral argument by *H. E. Briggs* and *J. L. Erdall*, first assistant attorney general. They argued, among other things, that the association and its receiver are estopped from questioning the validity of the deposit. *Berry v. Knights Templars' & M. L. I. Co.* 46 Fed. Rep. 439, and cases cited; *Diamond Plate Glass Co. v. Minneapolis Mut. F. Ins. Co.* 55 id. 27; *Railroad Co. v. Harris*, 12 Wall. 65; *Van Dresser v. Oregon R. & N. Co.* 48 Fed. Rep. 202; *Lafayette Ins. Co. v. French*, 18 How. 404; *Ehrman v. Teutonia Ins. Co.* 1 Fed. Rep. 471; *Gibson v. Manufacturers' F. & M. Ins. Co.* 144 Mass. 81; *Sparks v. Nat. M. Acc. Asso.* 100 Iowa, 458; Murfree, Foreign Corp. § 203; *Kadish v. Garden City Eq. L. & B. Asso.* 151 Ill. 531; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 27 Am. & Eng. Ency. of Law, 360, 364, 367, and cases cited; *North Hudson Mut. B. & L. Asso. v. First Nat. Bank*, 79 Wis. 31; *Hall Mfg. Co. v. Am. R. Supply Co.* 48 Mich. 331; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322; Morawetz, Priv. Corp. §§ 648–653, 689–699; *Manchester & L. R. Co. v. C. R. Co.* 66 N. H. 100.

PINNEY, J. 1. The principal question presented by these appeals is as to the construction, validity, and effect of the law

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of Wisconsin requiring foreign mutual building and loan associations to make a deposit of securities of the value of $100,000 with the state treasurer as a condition upon which such corporations may receive a license from and transact business in this state. The statute (secs. 2014*a*, 2014*b*, S. & B. Ann. Stats.) provides that "no foreign building and loan association . . . shall issue its shares, receive moneys or transact any business in this state unless such association shall have and keep on deposit with the state treasurer of Wisconsin, in trust, for the benefit and security of all its members *in this state*, the securities of the actual cash value of $100,000 of the kind mentioned in section 2 of this act; to be approved and accepted by said state treasurer, and held in trust as aforesaid, until all shares of such association held by residents of this state shall have been fully redeemed and paid off by such association, and until its contracts and obligations to persons and members residing in this state shall have been fully performed and discharged." The deposit is required at all times to be kept good and of the value of $100,000. The defendant corporation, in order to be allowed to enter the state and transact its proper business as a building and loan association therein, and to obtain a license to that end, as it did May 10, 1889 (which was renewed from time to time, and continued in force during the entire period it transacted business in said state), deposited with the state treasurer of Wisconsin, as it appears, its mortgage securities taken in the course of its business, to the required amount.

The defendant corporation was a foreign corporation, created and existing under the laws of the state of Minnesota, located and having its principal office in Minneapolis. The general nature of its business was "to assist its members in saving and investing money, in buying real estate, and in procuring money for other purposes, by loaning or advancing under the mutual building society plan." By ar-

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ticle 6 of its articles of association, the government of the corporation and the management of its affairs were vested in a board of seven directors, chosen from and by the stockholders. By its amended articles of association, adopted July 31, 1888 (article 19), it was provided that "the board of directors may sell and dispose of the mortgages held by this corporation whenever they may deem best, and as provided by the by-laws;" but no by-laws on the subject were adopted. Article 16 of the same date provided that "the directors of this corporation may enter into such contracts and agreements and appoint such agents as they may deem for the interest best of its affairs." Article 19 was amended July 11, 1888, so as to read as follows: "The board of directors shall not sell or dispose of any of the mortgages owned by this corporation."

The Minnesota statute (chapter 236 of the General Laws for 1889, which became a law April 22d of that year, before the defendant corporation was licensed to do business in Wisconsin, as amended June 1, 1891, and embodied in Gen. Stats. of Minn. 1894, sec. 2860) provided, in substance, that every building and loan association governed by the act should deposit and keep with the state auditor or a trust company all mortgages or other securities received by it in the usual course of business, and that, whenever required by the laws of any other state, territory, or nation, its securities sufficient to allow such association to enter and do business in such state, territory, or nation might be deposited with some officer authorized to receive the same in such state, territory, or nation, under the laws thereof, for the benefit of its members and creditors. Provisions were made regulating the transfer accordingly, which are so extended as not to admit of convenient quotation; but they seem to plainly recognize as lawful a deposit in another state of securities of the association, in order to entitle it to a license to enter such state and transact its business therein. Suffice

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it to say that the provisions of the Minnesota statute seem designed to facilitate the convenient using and tracing of its securities deposited for the purpose indicated, and its provisions appear to be in the main directory. Compliance with it appears to be a matter of local administration, and not a condition precedent to the right to use and deposit its securities for the purpose of entering and transacting business in such other state.

Within twenty days after the enactment of the Wisconsin statute, the corporation had constituted the state treasurer of Wisconsin "a depository for temporary convenience in complying with the laws of Wisconsin in regard to deposit of securities, $100,000," and resolved that it would "comply with the Wisconsin law as soon as possible." A license was issued to it pursuant to the statute, and it was renewed or continued in force until January 1, 1894.

2. In view of the action of the defendant through its board of directors, and the fact that it is conceded that the securities of the kind and character mentioned were held by the state treasurer of Wisconsin when the action was commenced to the amount of $145,234, we must conclude and hold that the mortgages in dispute were deposited with the state treasurer by the defendant corporation, or by its authority, in a *bona fide* attempt "to comply with Wisconsin law," as it had already resolved to do and it had made the state treasurer of that state its depository for that purpose. The Wisconsin law required the deposit of securities under the act to be made with the state treasurer. The defendant corporation obtained the prescribed license. It was required and it was its duty to deposit the securities mentioned to the amount of $100,000. This, it would seem, had been agreed should be done; and, upon the facts disclosed by the record, we think that it is a reasonable presumption that what was agreed to be done was done in the manner and for the purposes prescribed by the act. In *Sparks v. Nat. M. Acc.*

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Asso. (Iowa), 69 N. W. Rep. 678, it was held that when a foreign insurance company is shown to have transacted business in a state where, by the statute, certain acts were to be done by that company before it had a right to transact business therein, a conclusive presumption arises that the company has complied with the law in that respect. It is alleged in the counterclaim, in substance, that the provisions of the Minnesota statute were not complied with by the corporation defendant in making the deposits with the state treasurer of Wisconsin. The state authorities of Wisconsin, in receiving these securities as provided by the statute, were not bound to investigate the question of local administration or compliance with the law of Minnesota by the corporation and state authorities. The allegations that the possession of the securities by the state treasurer was wrongful, and that they were delivered to him by officers and employees of the corporation without lawful authority, are legal conclusions. It was enough that the securities were, as it is conceded, the property of the corporation; and that its directors, who deposited them for the purpose indicated, had power "to enter into such contracts and agreements as they might deem for the best interest of its affairs;" and that the directors, in the exercise of their discretion, desired to obtain a license to prosecute and carry on the business of the corporation in Wisconsin in order to realize the profits and advantages consequent upon such extension of its business, which it appears has been extended to thirty-four states. *Heath v. Silverthorn L. M. & S. Co.* 39 Wis. 146.

3. It was within the power of the directors to determine upon and make the intended extension of the business of the corporation; and it was their duty and within their power as well to make the necessary deposit of its securities as required by the Wisconsin law, which was a condition precedent to the right of the corporation to obtain the desired license and transact its business in Wisconsin. In any view

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that may be taken of the case, we think that the transaction was within the undoubted power of the corporation. The deposit was made accordingly. The license was issued. The defendant entered the state, and carried on its business therein, and for a period of five years derived the benefits and advantages expected to result from such extension of its business, and the protection and authority of the state. It was well understood by the corporation, its directors, officers, and members, that these securities had been deposited, and had so remained, with the state treasurer, under the pledge specified in the Wisconsin statute, and until financial disaster and insolvency overtook the corporation. It could enter the state of Wisconsin, and carry on its business, only on complying with the terms and conditions of the Wisconsin statute. Having the right to extend its business, it seems clear that it was not *ultra vires* the corporation to comply with the conditions upon which alone it could lawfully obtain a license to so enter the state and carry on its business, the prosecution of which was for the common advantage and profit of the corporation and of all its members and shareholders.

4. It is familiar law that the recognition of the existence of a corporation by any other than the state of its creation, and the enforcement of its contracts made therein, depend purely upon the comity of such other state or states,—"a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy." "Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, *that such assent may be granted upon such terms and conditions* as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; *or they may exact such security*

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for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." This was so held by the supreme court of the United States, nearly thirty years ago, in *Paul v. Virginia*, 8 Wall. 168, 181, affirmed in that court by many subsequent cases, and as well by other courts of the highest respectability and authority. *Hooper v. California*, 155 U. S. 648, and cases cited; *Relfe v. Rundle*, 103 U. S. 222, 225; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485; *Morse v. Home Ins. Co.* 30 Wis. 496; *State ex rel. Drake v. Doyle*, 40 Wis. 175, 197; *State ex rel. Covenant M. B. Asso. v. Root*, 83 Wis. 667, 680; *Wyman v. Kimberly-Clark Co.* 93 Wis. 554.

In *Hooper v. California*, *supra*, the cases in the supreme court of the United States on the subject are collected and cited, and it was there stated that: "The principle that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state has been long settled, and many phases of its application have been illustrated by the decisions of this court. While there are exceptions to this rule, they embrace only cases where a corporation created by one state rests its right to enter another, and to engage in business therein, upon the federal nature of its business; as, for instance, where it has derived its being from an act of Congress, and has become a lawful agency for the performance of governmental or *quasi*-governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is therefore solely within the paramount authority of Congress. In these cases the exceptional business is protected against interference by state authority." In the case cited the court said: "The state of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a ma-

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rine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, *she has the right to enforce any conditions imposed by her laws* as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company; and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the constitution of the United States." The doctrine thus established is, in our judgment, conclusive as to the validity of the pledge of the securities here in question, under the Wisconsin statute, and of the trusts therein specified. The defendant association clearly had the power to make the deposit as incident to the accomplishment of the purpose for which it was created.

In *North Hudson Mut. B. & L. Asso. v. First Nat. Bank*, 79 Wis. 31, 36, this court held that a building and loan association might lawfully do those things reasonably necessary in order to accomplish the objects and purposes of its organization which were not expressly forbidden. In general, in exercising the powers conferred by its charter, a corporation may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate unauthorized business. *Clark v. Farrington*, 11 Wis. 306; *State ex rel. Priest v. Regents of*

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University, 54 Wis. 159; *Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.* 5 Wis. 173. The association defendant had not been forbidden to make the deposit of its securities taken in the course of its business to enable it to enter the state of Wisconsin or any other state and obtain a license to transact its business therein. It was the absolute owner of these securities, and it might lawfully so use them. It was required by the statute that "if any securities on deposit as provided by this act are wholly or partially extinguished by payments on the same or otherwise, or such securities depreciate in value for any cause, new securities must be added, so that the deposit may at all times be kept good and of the value of $100,000." [Sec. 2014*b*, S. & B. Ann. Stats.] The association defendant, by accepting its license, was bound to comply with the law; and, in the absence of any allegations to the contrary, it must be presumed that all mortgages deposited at or after the date of the license, May 10, 1889, were deposited for the purpose of complying with the law and keeping its deposit up to the required amount of $100,000. The subsequent amendment to the articles of incorporation (July 11th), providing that "the board of directors shall not sell or dispose of any of the mortgages held or owned by the corporation," is relied on; but this provision must be construed, we think, in connection with the statute of Minnesota, which, as already noticed, quite clearly contemplated that the securities of the association might be used and pledged, if need be, for the purpose of complying with the law under which it could enter to transact business in another state. It was not intended by this amendment to deprive the corporation of the power, by the use of its securities, to maintain and keep good its deposits, in order to transact its business in the thirty-four states which it appears to have entered for that purpose. The more reasonable view would seem to be that the amendment was intended to prevent an absolute

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sale or traffic in its securities, and not a deposit of such securities for the purpose indicated.

We arrive, therefore, at the conclusion that the deposit of securities in question, made with the state treasurer for the purpose indicated, was within the lawful power of the corporation as represented by its directors, and that the action of the directors in making it was binding upon the corporation and all its members to the extent and according to the terms of the statute under which it was made.

5. The deposit was, as we have said, within the power conferred upon the corporation, and not in violation of the trust reposed in the board of directors, that the affairs of the corporation should be managed, and its property and funds applied, solely for the purpose of carrying out the objects for which the corporation was created. It is well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract in question has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance of the contract. Much less will the claim that the transaction was *ultra vires* be allowed as a ground for rescinding the contract and restoring to the complaining party, on that ground, the property or funds with which he has parted, after he has had the benefit of full performance of the contract by the other party; and, in general, the plea of *ultra vires* will not be allowed to prevail, whether interposed for or against a corporation, when it will not advance justice, but, on the contrary, will accomplish a legal wrong. *Kadish v. Garden City E. B. & L. Asso.* 151 Ill. 531; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *National Bank v. Matthews*, 98 U. S. 628, 629. "Where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would

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be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains." Sedgwick, Construction of Stat. & Const. Law, 73. In 2 Beach, Priv. Corp. § 425, the subject is fully considered, and numerous modern authorities are cited, showing that "where a contract has been in good faith fully performed, either by the corporation or the other party, the one who has received the benefit of it will not be permitted to resist its enforcement by the plea of a mere want of power." *Darst v. Gale*, 83 Ill. 136; *Carson City Sav. Bank v. Carson City Elevator Co.* 90 Mich. 550; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.* 127 N. Y. 260; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; *Bradley v. Ballard*, 55 Ill. 415; *State Board of Agriculture v. Citizens' St. R. Co.* 47 Ind. 407; *Oil Creek & A. R. Co. v. Pennsylvania Transp. Co.* 83 Pa. St. 160, 166.

The result of these views is that the receiver appointed by the circuit court for Dane county, Wisconsin, is entitled to retain the securities in question, and to subject them, under the order of the court, to the fulfillment of the trust upon which they were so deposited; and, to that end, they may be sold or collected, and the proceeds so applied, and any residue that may remain must be turned over to the appellant, the receiver appointed by the district court of Hennepin county, Minnesota. The corporation defendant, as well as its stockholders and its receiver appointed by the court in Minnesota, are estopped from disputing the validity of the trust upon which the state treasurer had received these securities and held them when the corporation became insolvent and this action was commenced. The corporation, by its directors, consented to and made the deposit, and their action became binding alike on members and stockholders in other states; and they have thus waived all right, on legal or constitutional grounds, to question the validity of

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the trust on which the securities are held, as expressed in the statute.

6. We cannot perceive how it can be maintained that the contract clause of the federal constitution can be invoked to release these securities from the operation and effect of such pledge and estoppel, whatever view may be taken of the rights and relations of the entire body of stockholders as between themselves and the corporation. They have waived their right to insist upon the constitutional objection they urge against the Wisconsin statute, or to question the validity of the trust. Whatever modification or change may have occurred in the contractual relations existing between these parties is the sole result of their lawful and proper consent, or of those who were chosen and fully empowered in law to represent them, namely, the board of directors, without whose authority the securities could not have been deposited or pledged under the statute. The right to invoke the contract provision of the federal constitution, we think, has been waived by them; and the case on this point falls strictly within the principle stated by Judge Cooley in his celebrated work on Constitutional Limitations (6th ed., p. 214), where he states that "there are cases where a law, in its application to a particular case, must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to *waive* the protection, and to *consent* to such action as would be invalid if taken against his will." And several instances of the application of this principle are given. The learned author states: "In these and the like cases the statute must be read with *an implied proviso* that the party to be affected shall assent thereto; and such consent removes all obstacle, and lets the statute in to operate the same as if it had in terms contained the condition."

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There are many well-considered cases sustaining the position that a party may, by his own act or conduct, preclude himself from insisting upon constitutional objections to a statute affecting his rights. The subject is discussed by PAINE, J., in *Burrows v. Bashford*, 22 Wis. 104, where the opinion is expressed that it is not unconstitutional for the legislature to provide that a party may voluntarily subject himself to unconstitutional provisions as a condition to the enjoyment of a new advantage given by the act. So, in the present case, in consideration of the benefits derived by the defendant corporation and its shareholders from the statute under consideration, it being allowed to enter the state and transact business therein, they must be precluded from insisting upon the invalidity of the statute. *Bank of Columbia v. Okely*, 4 Wheat. 235; *People v. Murray*, 5 Hill, 468. A party may renounce a constitutional provision made for his benefit (*Embury v. Conner*, 3 N. Y. 511; *Lee v. Tillotson*, 24 Wend. 337), and, having waived it, cannot subsequently ask for its protection. The views we have already expressed render the contention of the appellant in respect to the relations which the shareholders of a mutual building association ordinarily sustain to the corporation and to each other inapplicable, as well as the contention that the enforcement of the trust specified in the statute in these securities will destroy equality of right between the shareholders in general, rendering, as it is contended, the Wisconsin shareholders preferred shareholders.

7. Whatever the practical result of the enforcement of the trust in favor of Wisconsin shareholders, creditors, and others sustaining contractual relations with the corporation defendant may be, it rests, as we think and as we hold, upon the consent of the corporation and of its shareholders lawfully given, as it well might be in the present case, by and through its board of directors, for a valid consideration received by the corporation to the benefit and advantage of those now

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denying its validity. The right of the state of Wisconsin to pass and enforce the act for the better protection of its citizens and residents against irresponsible foreign corporations entering, or desiring to enter, the state and transact business therein with its citizens, cannot, we think, be denied. We cannot assent to the position that the security afforded by the deposit required by the act, and thus consented to and made by the corporation through its directors, may be avoided or nullified at the instant when the necessity for retaining and enforcing it becomes imperative. If it was lawful to require and take the security, it is rightful and lawful to insist on it, and enforce it, according to the very terms and true meaning of the act under which it was given; and insolvency of the corporation will not release the trust or discharge it. The language of the Wisconsin statute is free from doubt or ambiguity, and construction has no office to perform in respect to it. Its meaning and purpose are obvious, and it is the manifest duty of the court to give it full effect. This cannot be done without strictly applying the securities or their proceeds to the uses prescribed by the statute. This trust was not created for the benefit or indemnity of members, creditors, and shareholders of the defendant corporation generally, residing out of the state. These were not within its plan, purpose, or policy. The deposit was required and made in pursuance of a wise state policy, solely for the benefit and indemnity of resident shareholders and creditors, and for their protection and advantage only. Language could not have been readily employed to make the intention plainer than is expressed in the statute. To now turn these securities over to the appellant, to the end that they may be collected and converted, and the proceeds applied ratably in satisfaction of all the claims of shareholders and creditors generally, whether residents of Wisconsin or not, would, we think, be a manifest perversion of the trust, and render the security and indemnity they were deposited

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to furnish resident shareholders, and others indicated in the statute, a mere delusion.

We think that the demurrers to the appellant's answer and counterclaim were properly sustained.

By the Court.— The orders appealed from are affirmed.

On the distribution of the assets of an insolvent insurance company, see an extensive note to *Boston & A. R. Co. v. Mercantile T. & D. Co.* (82 Md. 535), in 38 L. R. A. 97.— REP.

CLANCEY, Appellant, vs. ALME and wife, Respondents.

December 11, 1897 — January 11, 1898.

Mortgages: Foreclosure: Homesteads.

A mortgage covering a homestead and other lands was foreclosed and the entire premises sold, the nonexempt portion being worth less than the amount of the debt. *Held*, that the surplus money remaining after satisfaction of the mortgage debt should be deemed proceeds of the sale of the homestead, and exempt from execution, under sec. 2983, R. S.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an appeal from an order which directs the payment of the surplus moneys arising from the sale of mortgaged premises under a foreclosure judgment to the mortgagors. The respondent *Edwin E. Alme* was the owner of an eighty-acre tract of land, upon which his home was situated. The whole tract was under a mortgage, which was foreclosed, and a sale made under the judgment. It was all sold as one parcel. It sold for enough to pay the mortgage debt and to leave a surplus. The appellant owned a judgment against *Edwin E. Alme*, which was a lien upon all the mortgaged premises which was not included in the homestead. He made claim for the surplus moneys. The

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court directed them to be paid to the mortgagors. The appeal is from that order.

For the appellant there was a brief by *E. K. Loverud* and *W. W. Gilman*, and oral argument by *Mr. Gilman.*

For the respondents there was a brief by *H. A. Huber* and *Erdall & Swansen*, and oral argument by *Mr. Huber* and *Mr. Sam. T. Swansen.*

NEWMAN, J. The question presented is not difficult of solution. All the principles involved in its solution have been settled by the decisions of this court. The right of the owner to have his homestead exempt from "liability in any form" (R. S. sec. 2983) for his debts is superior to the equity of a creditor to have it applied to the payment of his debt. However it may have been formerly and in the absence of a statute declaring his right, it is now the settled policy of the law to prefer the homestead right as against the rights of creditors. *Hanson v. Edgar*, 34 Wis. 653; *Smith v. Wait*, 39 Wis. 512; *Rozek v. Redzinski*, 87 Wis. 525. In furtherance of this benevolent purpose, the proceeds of the sale of the homestead are made exempt from liability for the debts of the owner "while held with the intention to procure another homestead therewith." R. S. sec. 2983. It has been held, in harmony with the liberal spirit of the exemption laws, that where a homestead which is incumbered with other property by a common mortgage is applied by the owner, along with the other property, as one parcel, to the payment of the mortgage debt, a surplus remaining after the payment of the debt will be deemed proceeds of a sale of the homestead, and exempt from liability for the debts of the owner of the homestead. This was in a case where the value of the property not included in the homestead was less than the amount of the mortgage debt, so that it would not alone have sold for enough to realize the debt. *Binzel v. Grogan*, 67 Wis. 147; *Hoppe v. Goldberg*, 82 Wis. 660.

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This principle is entirely applicable to the case of a surplus arising from a foreclosure sale of property similarly situated. Here the lands not included in the homestead were worth much less than the mortgage debt. The mortgage debt was upward of $3,900. The value of the lands not included in the homestead was about $1,600. The sale was for $4,600. The respondents desire to use the surplus moneys to procure another homestead.

By the Court.— The order of the circuit court is affirmed.

THOEN, Respondent, vs. HARNSTROM, Appellant.

December 11, 1897 — January 11, 1898.

Garnishment: Discontinuance: Election of remedies: Failure to use diligence in ascertaining facts.

1. The principal defendant may procure the discontinuance of garnishment proceedings by giving the undertaking provided for in sec. 2771, S. & B. Ann. Stats., or he may move for their dismissal on the ground that he owned property subject to execution sufficient to satisfy the claim; and his election of the former remedy is a waiver of his right to resort to the latter, at least until he has been relieved of his election on equitable grounds.
2. The mere fact that the defendant in such a case, at the time of making his election, was ignorant of facts upon which he subsequently moved to dismiss the proceedings is insufficient to warrant the setting aside of such election, where such ignorance was the result of an unexcused failure to resort to means of knowledge reasonably within his reach.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Plaintiff and the principal defendant resided in Chicago. The former sued the latter in the circuit court for Dane county, and as incidental thereto commenced this garnishee action. The affidavit which was the foundation of the gar-

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nishee proceeding was in the usual form, stating, among other things, that plaintiff verily believed that the defendant was not possessed of property liable to execution sufficient to satisfy the plaintiff's claim. After the service of garnishee process the principal defendant filed an undertaking pursuant to the statute, for the purpose of releasing the garnishee. Thereafter, on affidavit showing that such principal defendant was the owner of a large amount of property in the city of Chicago, liable to execution, and that when he gave the undertaking to release the garnishee he did not know that the cause of action against him did not arise in the state of Wisconsin, motion was made to dismiss the garnishee action and return such undertaking. The motion was denied, and from the order entered this appeal was taken.

J. A. Eggen, for the appellant, contended, *inter alia*, that it is an undisputed fact that at the time of making the affidavit appellant, to the knowledge of respondent, had property sufficient to satisfy more than a score of such claims as that made by the latter in his affidavit. One of the conditions precedent to the commencement and maintenance of a valid garnishment is therefore wanting. The action can no more be maintained than if it had turned out that the original action was in tort, or that judgment had been entered therein and no execution issued. The fact that the property is not situated in this state is immaterial, because the statute does not require that it shall be in any particular place or state, and because respondent, being himself a resident of the city and state in which the property is located, is in no position to complain of the location of the property.

Ben E. Wait, for the respondent.

MARSHALL, J. Sec. 2771, S. & B. Ann. Stats., provides that "the defendant may, at any time after the commencement of the action and before judgment, file with the clerk of the court an undertaking, executed by at least two sureties, . . .

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to . . . pay to the plaintiff the amount of the judgment, with all costs that may be recovered against such defendant in the action, not exceeding a sum specified" in such undertaking; and that, on compliance with the statutory requisites in the matter, the garnishee shall be discharged and the garnishee proceedings deemed discontinued. So, upon the service of the garnishee summons upon the garnishee defendant, the appellant had his election to give the bond provided for by statute and thereby supersede the garnishee proceedings, or to move the court for a dismissal of such proceedings, under the rule in *Orton v. Noonan*, 27 Wis. 572, and *German American Bank v. Butler-Mueller Co.* 87 Wis. 467, if he deemed the facts sufficient to invoke the application of such rule. The two remedies were inconsistent; therefore, obviously, the appellant could not have both. He made his election to give the undertaking, and thereby the garnishee proceedings were, by force of the statute, discontinued and at an end. It is not perceived how the remedy for the dismissal of the proceedings could be resorted to under such circumstances in any event, but certainly not till the appellant had been relieved on some ground of equity from the election he had made to supersede the garnishee proceedings in the manner provided by statute. *Eau Claire Grocer Co. v. Hubbard*, 97 Wis. 661. No ground for such relief was set forth in the moving papers.

The mere fact that the appellant did not know that the cause of action sued on did not arise in the state of Wisconsin was immaterial, because the plaintiff had the absolute right to resort to the Wisconsin courts to enforce his claim if he saw fit to do so. *Eingartner v. Illinois Steel Co.* 94 Wis. 70. But if it were otherwise, no excuse is shown for the want of knowledge which appellant alleged. A party cannot, except at his peril of being bound by his action, proceed ignorantly in matters respecting his own interests, when such ignorance is the result of a failure to resort to reasonable means of knowledge within his reach, unless

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there is some good excuse shown for such conduct. No excuse whatever is shown here. The appellant simply alleged that he did not know. It is perfectly apparent that he might have known had he made reasonable efforts to discover the facts. Being a debtor, the presumption from that fact is that he knew the facts out of which the debt arose, and it would take a strong case to rebut such presumption. But, as stated, there was no reason set forth in the moving papers sufficient to warrant the court either in relieving the defendant from his election to supersede the garnishee proceedings by giving an undertaking under the statute, or for dismissing the garnishee proceedings if such relief had been granted.

By the Court.— The order appealed from is affirmed.

CASSODAY, C. J. (concurring). As I understand, the principle upon which I differed from the majority of the court in *Eingartner v. Illinois Steel Co.* 94 Wis. 70, is not involved in this appeal. On the contrary, the right to maintain an action "for and against property and rights of property located or having a *situs*" in this state is there conceded in my opinion. 94 Wis. 83, 84. That opinion has recently been expressly sanctioned by the supreme court of Mississippi, as stating "the true ground for the conclusion reached by the court in *Eingartner's Case.*" *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782.

LYLE, Respondent, vs. ESSER, Appellant.

December 11, 1897 — January 11, 1898.

Limitations: Promissory notes: Partial payments: Reference.

1. In an action on a promissory note given in 1881 in settlement of an account stated, it appeared, among other things, that between that time and 1894 defendant ran an open store account with

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plaintiff, payments being made from time to time in money and produce, frequently when he owed nothing; that the note was not mentioned during such time; that no specific application of such payments was made, but the defendant instructed the plaintiff to give him credit therefor and the latter credited them on his books; that in 1893 the plaintiff wrote the defendant for money without specifying for what the same was due; that the defendant supposed his account was paid, but nevertheless made a payment without applying the same; that on March 31, 1893, defendant made his last purchase of plaintiff and thereafter there remained a balance to his credit on the latter's books; that in 1894 defendant made a further payment without inquiring as to the condition of his account or making any application; that thereafter plaintiff applied such balance, including such last payment, to the payment of interest on the note. *Held*, that the note was taken out of the statutes of limitation by part payment.

2. The granting of a reference in such a case was proper, as the trial necessarily required the examination of a long account.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This action was commenced in justice's court. The complaint alleges, in effect, that January 1, 1881, the plaintiff and one F. W. Dufrenne were copartners doing business as merchants under the firm name of Dufrenne & Lyle at Middleton, and had been for some time prior thereto; that on that day the defendant was indebted to the firm on account for merchandise in the sum of $166.59, and gave his note to the firm therefor, payable one year after date, with interest at ten per cent. until paid; that the interest was paid thereon to January 1, 1890; that payments had been made thereon from time to time (the last being made February 7, 1894); that Dufrenne died July 18, 1892; that the plaintiff, as surviving partner, was the owner and holder of the note; and that there was due thereon $200, for which he prayed judgment and costs. The answer alleged, in effect, that on and prior to January 1, 1883, the defendant delivered to the firm property and money in full satisfaction, discharge,

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accord and satisfaction of the note in question, and also pleaded the six-years statute of limitations.

The cause having been referred to a referee to hear, try, and determine, and a trial having been had before such referee, at the close thereof the referee found, as matters of fact, in effect, that the note was given to balance a running account, as stated in the complaint; that the store accounts between the parties during 1895–96 were distinct from the accounts and note involved in this suit, and had been balanced, and were disregarded; that between January 1, 1881, and February 7, 1894, no mention of the note was made by either party to the other, but that after that time the plaintiff called the defendant's attention to the note; that prior to February 7, 1894, and after that date, the defendant had been asked for money by the plaintiff, without any statement as to the obligation upon which it was exacted; that between January 1, 1881, and February 7, 1894, when the defendant made the last payment to the plaintiff, the defendant ran an open store account with the plaintiff, and at various times between said dates paid money to the plaintiff when he owed nothing on his book account, and received credit therefor on the plaintiff's books, without reference to the account or the note; that during that time neither party made any application of such payments, except to credit the defendant therefor on the plaintiff's books; that the defendant expected to pay both the note and his book account in cash and produce; that, whenever the defendant paid cash or delivered produce to the plaintiff, he merely instructed the plaintiff to give him credit for the same; that in 1893 the plaintiff wrote to the defendant, asking for a payment of money without specifying for what the same was exacted, whereupon the defendant made a payment to the plaintiff, but made no application of the same; that when the defendant received the letter he supposed his account was paid; that after February 7, 1894, when the last payment was so

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made by the defendant, the plaintiff, for the first time, made application of the balance then standing to the defendant's credit by making indorsements of interest on the note, and by preparing a pass book containing the charges of interest on the note, and also the credits of payments made by the defendant, including the payment of February 7, 1894, which pass book was delivered to the defendant; that March 31, 1893, the defendant made his last purchase from the plaintiff, and, after deducting the amount of the purchase, there remained a considerable balance standing on the plaintiff's books to the defendant's credit; that February 7, 1894, the defendant made a further payment of $20 to the plaintiff, but without any inquiry as to the condition of his obligations to the plaintiff, or making any application of the payment or of the amount previously standing to his credit.

As conclusions of law the referee found, in effect, that the plaintiff, as such surviving partner, was entitled to maintain this action; that the plaintiff had the privilege of applying the payment of $20 so made February 7, 1894, upon the note, and that the same was thereby revived and renewed, so that it became a valid, legal, and subsisting debt due from the defendant to the plaintiff; that the plaintiff was entitled to judgment on the note against the defendant in the sum of $200.

Upon application to confirm the report, the court ordered the referee to find additional facts. In obedience to the order the referee found, as additional facts, the following: The state of the accounts between the parties at the end of each year from January 1, 1881 (leaving out of consideration the principal and interest on the note), was as therein stated (showing a balance due the defendant at the end of each year of from $72 to $123.38, except January 1, 1883, when there was $19.60 due the firm). The state of the accounts between the parties at the end of each year from January 1, 1881 (taking into consideration the annual interest on the note in question), was as therein stated, in favor

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of the defendant for six years between January 1, 1882, and January 1, 1889, and in favor of the firm and the plaintiff for eight years between January 1, 1883, and January 1, 1895. The defendant never intended to make the plaintiff a gift of any money or property referred to therein.

The court thereupon confirmed the report of the referee, and ordered judgment in accordance therewith. From the judgment entered thereon accordingly the defendant appeals.

For the appellant there was a brief by *Fehlandt & Whelan*, and oral argument by *C. E. Whelan*. They contended, *inter alia*, that the taking of the debt out of the bar of the statute must be by intent of the debtor. The payment made by him must be to the debt barred, and the directness of reference to the particular debt must be apparent. The particular debt must be in the debtor's mind when he makes the payment, and the payment must not be won from him by subterfuge or a long series of skillful maneuvers wherein the barred debt is not once mentioned. *Pritchard v. Howell*, 1 Wis. 131; *Brown v. Parker*, 28 id. 21; *Walrod v. Manson*, 23 id. 393; *Martin v. Fox & Wis. Imp. Co.* 19 id. 552; *Carpenter v. State*, 41 id. 36; *Engmann v. Estate of Immel*, 59 id. 258; *Tippets v. Heane*, 1 Cromp., M. & R. 252; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Linsell v. Bonsor*, 2 id. 241; *Jones v. Langhorne*, 19 Colo. 206; *Lisner v. Hitson*, 95 Ga. 527; Tiedeman, Commercial Paper, § 377; *Gage v. Dudley*, 64 N. H. 271; *Holt v. Gage*, 60 id. 536, 541; *Livermore v. Rand*, 26 id. 90; *Brown v. Latham*, 58 id. 30; *Pond v. Williams*, 1 Gray, 630; *Crow v. Gleason*, 141 N. Y. 493; 1 Wood, Limitations (2d ed.), 271 *et seq.*; *Harper v. Fairley*, 53 N. Y. 442; *Albro v. Figuera*, 60 id. 630; *Austin v. McClure*, 60 Vt. 456; *Cleaveland v. Dinsmore*, 59 id. 436; *Robie v. Briggs*, id. 450; *Kallenbach v. Dickinson*, 100 Ill. 427; *Armistead v. Brooke*, 18 Ark. 521.

For the respondent there was a brief by *Olin & Butler*, and oral argument by *H. L. Butler*.

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CASSODAY, C. J. The trial of the issue of fact raised by the pleadings necessarily required the examination of a long account, and hence there was no error in granting the reference. R. S. sec. 2864; *Turner v. Nachtsheim*, 71 Wis. 16; *Sutton v. Wegner*, 74 Wis. 347; *Briggs v. Hiles*, 79 Wis. 571.

Our statutes provide, in effect, that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the cause out of the operation of the statutes of limitation, unless the same be contained in some writing signed by the party to be charged thereby (sec. 4243, R. S.); but that nothing contained in that section shall alter, take away, or lessen the effect of a payment of any principal or interest made by any person, but that no indorsement or memorandum of any such payment, written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the holder thereof, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the statutes of limitation. R. S. sec. 4247.

Under these statutes it is very manifest that no oral acknowledgment or promise of the debtor can operate to take a case out of the statute. There is no pretense that the defendant has ever given or signed any such written acknowledgment or promise. It is also manifest from the language of the statute that no indorsement or memorandum of any such payment, made by the holder of such instrument without the concurrence of the debtor and actual payment, can operate to take the case out of the statute. It has been held that even an indorsement of a part payment, in the handwriting of the debtor but not signed by him, will not prevent the operation of the statute, if no money or valuable consideration actually passed between the parties, even if they at the time orally agreed that it should be deemed a payment. *Blanchard v. Blanchard*, 122 Mass. 558. But under the statute a part payment actually made by the

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debtor has the same effect, as to taking the case out of the statute, as a written acknowledgment or promise to pay the debt, signed by the debtor. To have that effect, however, the debtor must make the part payment on the debt in suit. By making such part payment the debtor admits the balance of the debt to be due, and impliedly agrees to pay it. *Tippets v. Heane*, 1 Cromp., M. & R. 252; *Waters v. Tompkins*, 2 Cromp., M. & R. 723. But, where there are two clear and undisputed debts, the case is not taken out of the statute, as to either debt, by evidence of a part payment within six years, not specifically appropriated to the one debt or the other. *Burn v. Boulton*, 52 Eng. C. L. 476; *Pond v. Williams*, 1 Gray, 630. So it would seem that the part payment, to have the effect of taking the case out of the statute, must be made to the creditor or his agent, or to some one who stands in the relation of personal representative. *Clark v. Hooper*, 10 Bing. 480; *Stamford, S. & B. Banking Co. v. Smith* [1892], 1 Q. B. 769. Such part payment may be shown, however, by any competent evidence. It does not require an express declaration of the debtor at the time of making it. *Waters v. Tompkins, supra.* This court has held that part payment of a debt, after the statute has run, will have the same effect as though paid before the statute had run. *Engmann v. Estate of Immel*, 59 Wis. 249, 259.

Here it would seem that the note was given for the stated balance of the book account, but the account was continued thereafter, and payments credited thereon, right along, as though no note had been given. The state of the account, as found, indicates pretty clearly that the several payments made were intended by the debtor to apply upon the note as well as the book account. The defendant testified to the effect that the plaintiff never asked him to pay interest on the note; that he paid it on his account; that the plaintiff told him once that his account was paid, except the note;

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that the plaintiff asked him for money, and he always paid on account, and always told the plaintiff to give him credit for what he paid in; that the plaintiff wrote him a letter (he thought, in 1893) asking for money; that he then thought his account was all paid up; but that he went right after he received the letter, and paid the plaintiff $30. The referee was justified in finding that the defendant never intended to make any gift to the plaintiff. On the contrary, it is apparent, from the dealings and all the circumstances, that the plaintiff exacted the money because it was due him on the note, and that the defendant made the payment because he knew he was indebted to the plaintiff on the note. The payment was therefore made as a part payment on the note. *Marshall v. Holmes*, 68 Wis. 556.

By the Court.— The judgment of the circuit court is affirmed.

SCHUSTER, Respondent, vs. ALBRECHT, Appellant.

December 11, 1897 — January 11, 1898.

Surface waters: Percolation: Rights of adjoining proprietors: Appeal.

1. Findings of fact cannot be reviewed on appeal unless exceptions thereto are preserved in the bill of exceptions.
2. The owner of land on which surface water accumulates has no right to conduct the water by an artificial channel to a point on his own land in close proximity to the line, where it will inevitably permeate the surrounding soil and percolate through the same into his neighbor's land, to the permanent injury of the latter.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an equitable action brought to prevent the defendant from constructing on his own land, but in immediate proximity to the plaintiff's land, a certain tile drain, from

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which, it is claimed, large quantities of water will percolate through the soil into the plaintiff's land, to his injury.

The parties own adjoining farms, a large part of the defendant's land being more than ten feet higher than the plaintiff's land. Where the two farms join, the defendant's land slopes down to the level of the plaintiff's, and there is a depression, which is swampy in wet seasons, and hard and tillable in dry seasons. This depression is divided between both farms. Upon the high part of the defendant's land, and at a distance of about a quarter of a mile from plaintiff's line, there is a natural depression; and in this depression there is nearly always an accumulation of surface water, forming a pond varying from two or three to fifteen acres in extent, and which has no natural outlet; and this pond has existed for many years without drainage. In 1895 the defendant conceived the idea of reclaiming the soil under said natural pond by draining the same. His plan was to lay a drain some 1,400 feet in length, composed of six-inch tile with loose joints, in a covered ditch several feet in depth, running from the pond in the direction of the lower part of his own land and approaching the plaintiff's land, the nearest point being somewhere about 250 feet from plaintiff's land. Upon the line of this drain he proposed to construct three wells, twenty to twenty-five feet in depth; the idea being that the water would escape into the surrounding soil through the loose joints of the tile, and at the wells. He had constructed some 1,100 feet of this drain, and dug two of the wells, when this action was brought, and a temporary injunctional order obtained, preventing him from continuing the ditch to its proposed terminus, on the ground that the water would reach and permanently injure the plaintiff's lowlands.

The court found that, if the ditch were completed as proposed by the defendant, the amount of water to be conveyed was so great, and the slope of the ground and the nature of

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the soil were such, that the water would percolate through the soil to the plaintiff's land, to his injury; and the injunction was made permanent. From this judgment the defendant appealed.

For the appellant there was a brief by *Fehlandt & Whelan*, and oral argument by *C. E. Whelan*. They contended, *inter alia*, that "the owner of an estate, for the purpose of securing or protecting its reasonable use and enjoyment, may obstruct or divert surface waters thereon, and which have come down from higher levels, by embankments, ditches, drains, and culverts and other constructions; and in doing so may lawfully hinder the natural flow of such waters and turn the same back upon or off onto or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion." *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 645; *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 id. 601; *Hoyt v. Hudson*, 27 Wis. 664; *Sweet v. Cutts*, 11 Am. L. Reg. 11; *Gannon v. Hargadon*, 10 Allen, 106; *O'Connor v. F. du L., A. & P. R. Co.* 52 Wis. 531; *Lessard v. Stram*, 62 id. 116; *Case v. Hoffman*, 72 N. W. Rep. 390; *Bates v. Smith*, 100 Mass. 181; *Franklin v. Fiske*, 13 Allen, 211; *Ogburn v. Connor*, 46 Cal. 346; *Gray v. McWilliams*, 98 id. 157; *Jordan v. St. P., M. & M. R. Co.* 42 Minn. 175, 6 L. R. A. 573, note; *O'Connell v. E. T., V. & G. R. Co.* 13 id. 394; *Lybe's Appeal*, 106 Pa. St. 626; *Bowlsby v. Speer*, 31 N. J. Law, 351; *Middlesex Co. v. McCue*, 149 Mass. 103; *Upjohn v. Board of Health of Richmond*, 46 Mich. 542; *Kennison v. Beverly*, 146 Mass. 467; *Peck v. Herrington*, 109 Ill. 611; *Gilfillin v. Schmidt*, 64 Minn. 29; *Sheehan v. Flynn*, 59 id. 436.

For the respondent there was a brief by *Jones & Stevens*, and oral argument by *E. R. Stevens*. They argued, among other things, that at common law there exists no natural easement or servitude in favor of the owner of the superior or higher grounds or fields for the discharge of surface

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waters accumulating on his land upon the land of the lower proprietor. The proprietor of the lower estate may, if he chooses, lawfully obstruct such waters and turn them back upon or on to or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion. *Hoyt v. Hudson*, 27 Wis. 656, 659; *Pettigrew v. Evansville*, 25 id. 223; *Wendlandt v. Cavanaugh*, 85 id. 256, 263; *Arimond v. Green Bay & M. Canal Co.* 31 id. 316; *Eulrich v. Richter*, 37 id. 229; *Spelman v. Portage*, 41 id. 148; *O'Connor v. F. du L., A. & P. R. Co.* 52 id. 530; *Hanlin v. C. & N. W. R. Co.* 61 id. 515; *Waters v. Bay View*, id. 642; *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437; *Nichols v. Dissler*, 31 N. J. Law, 461, 86 Am. Dec. 219; *Dickinson v. Worcester*, 7 Allen, 19; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569; *Chatfield v. Wilson*, 28 Vt. 49; *Wafle v. N. Y. C. R. Co.* 58 Barb. 413. Even under the civil law, and much less under the common law, the appellant would not have the right to impose on the lower estate the additional burden of receiving all the surface water collected in this pond on his land, which would naturally remain there if not interfered with by man. *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120; *Butler v. Peck*, 16 Ohio St. 334; *Livingstone v. McDonald*, 21 Iowa, 160; Angell, Watercourses, §§ 108*e*, 108*j*, 108*k*; Washburn, Easements, 355.

Winslow, J. The findings of fact seem to be supported by the evidence, but, even if they were not, there are no exceptions to the written findings preserved in the bill; hence, in any event, they cannot be reviewed.

It was held by this court in *Pettigrew v. Evansville*, 25 Wis. 223, that the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it, through an artificial channel, directly upon the land of another, greatly to his injury. As between private individuals, where no question of public duty or authority is involved,

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this principle has not been infringed upon, but has been recently reaffirmed by this court. *Wendlandt v. Cavanaugh*, 85 Wis. 256. In the present case the owner of the pond did not propose to discharge the water directly upon his neighbor's land, but proposed to conduct it, by an artificial channel, to a point on his own land in close proximity to the line, where it would inevitably permeate the surrounding soil and percolate through the same into his neighbor's land, and permanently injure the same. We perceive no logical difference between the quality of the two acts. In either case there is a permanent injury to his neighbor's land, caused by water conducted thereto by an artificial channel; and the injury caused by percolation artificially caused may easily be as great, or greater, than the injury caused by direct discharge in a stream. Gould, Waters, § 271.

By the Court.— Judgment affirmed.

JONES and others, Respondents, vs. ALFORD, Garnishee, Appellant.

December 11, 1897 — January 11, 1898.

Voluntary assignments: Failure to sign certificate: Curative act: Garnishment.

1. Failure of the court commissioner who approved the bond of an assignee for the benefit of creditors to sign the certificate required by sec. 1696, R. S., to be indorsed on the copy of the assignment deposited in the office of the clerk of the circuit court, renders the assignment void as to attacking creditors, even though the omission was inadvertent.
2. Where a voluntary assignment was void as to attacking creditors because of a failure to comply with a statutory requisite, rights of creditors which had become fixed by judgment in garnishment proceedings against the assignee were not affected by the subsequent passage of a curative act (sec. 2, ch. 334, Laws of 1897).

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3. Prior to the making of a voluntary assignment, void as to attacking creditors, property of the assignor had been levied upon under executions. Before the property was sold garnishment proceedings were commenced against the assignee. *Held*, that the assignor's interest in the surplus arising from the sale of such property was subject to garnishment under sec. 2786, R. S., and that the assignee was chargeable on account thereof.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The defendant Abbott, January 17, 1896, executed and delivered to *W. H. Alford*, the garnishee defendant, an assignment of all his property for the benefit of his creditors. At the time of making the assignment all the personal property of the defendant Abbott, not by law exempt, was in the hands of the sheriff of Dane county by levies under certain executions issued upon judgments obtained in the circuit court for that county against the defendant Abbott. A copy of said deed of assignment, with the indorsement thereon of the consent of said *Alford* as assignee to take upon himself the faithful discharge of the trusts specified in the assignment, etc., was filed as required by law, together with the following indorsement on said assignment:

"I hereby certify that the within is a true and correct copy of the original assignment, and of the whole thereof, made by C. F. Abbott to *W. H. Alford*, on the 17th day of January, A. D. 1896, and that the said assignee named in said original assignment did, in my presence, make the indorsement thereon, as required by section 1696 of the Revised Statutes of 1878.

"Dated January 17, 1896.

"Court Commissioner,
"Dane county, Wis."

Afterwards, on the 21st day of January, 1896, Charles N. Brown, court commissioner, indorsed upon the copy of said assignment the following certificate: "I hereby certify that

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my signature above the words 'Court Commissioner,' etc., at the end of the foregoing certificate, was omitted by inadvertence." The garnishee, *Alford*, denied liability, and the plaintiffs elected to take issue on the answer.

The court found that the purported certificate of January 17, 1896, was filed with the clerk of the circuit court, and at the same time said *Alford* filed a bond, as assignee, conditioned and executed as by law required; that the officer taking said bond was Charles N. Brown, court commissioner, and that at the time of the filing of said copy of said assignment and said bond he, the said Charles N. Brown, did not indorse, and at the time of the service of the affidavit for garnishment and garnishee summons had not indorsed, in writing, on said copy of such assignment, his certificate that the same was a true copy of the original, and the whole thereof, and that the assignee named in said original assignment did in his presence make the indorsement thereon as required by sec. 1696, R. S. 1878; and that afterwards, as stated, another certificate was indorsed January 21, 1896. The court further found that at the time of the service of the garnishee process, January 17, 1896, the said garnishee had in his possession and under his control certain real estate in Madison, Wisconsin, describing it, and the interest of said Abbott, as heir at law of Abijah Abbott, in certain other real estate in Trempealeau county; that at the time aforesaid the garnishee had personal property under his control and held by him by virtue of said assignment, being the personal property conveyed to the said garnishee by the said deed of assignment, described and set forth in the inventory of assets filed by him; that as assignee, under the direction of the court, he had sold the interest of said Abbott in the real property in Madison for the sum of $269.10, and that it had been stipulated that the assignee might sell, under the direction of the court, the interest in the lands in Trempealeau county; that the personal property of said Abbott, so

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seized and held by the sheriff of Dane county under certain executions, was sold under said executions, and that, after satisfying them, there remained in the hands of the sheriff, as a part of the proceeds of the sale of said personal property, $405.46, of which amount $183 had been delivered by the sheriff to said *Alford* as such assignee, and that said sheriff holds the sum of $222.46 thereof, which belongs to said *W. H. Alford* as such assignee, and which he is entitled to demand and receive; and that said *W. H. Alford*, the garnishee defendant, has no lien on or interest in said money or property as to the plaintiffs in this action.

The court held that the assignment was illegal and void as to the plaintiffs, and that said *Alford* was liable as garnishee to them in the sum of $674.56, together with the proceeds of the sale of C. F. Abbott's interest in the land in Trempealeau county; and that the plaintiffs were entitled to have said moneys and property, or so much thereof as might be necessary to satisfy the same, applied upon the judgment in their favor against the defendant C. F. Abbott for the sum of $511.54, damages and costs, which remained wholly unsatisfied. Judgment was entered charging *Alford* as garnishee as aforesaid, and that he pay to the clerk of the circuit court for Dane county the said sum of $511.54, and interest thereon from March 21, 1896, to be applied in satisfaction of said judgment, and for costs against the defendant *Alford*.

There was no bill of exceptions in the case. The only question before the court was whether the pleadings and findings of fact were sufficient to sustain the judgment rendered.

For the appellant there was a brief by *Fehlandt & Whelan*, and oral argument by *J. C. Fehlandt* and *C. E. Whelan*. They contended, *inter alia*, that a debt, in order to be subject to garnishment, must be owing absolutely at the time of the service of the garnishment summons; and it is neces-

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sary that the garnishee should have the absolute and actual possession or control of the property of the defendant in order to hold him liable therefor. Where the question whether there will be any indebtedness, or possession or control of property, depends upon future contingencies, the garnishee cannot be held. *Vollmer v. C. & N. W. R. Co.* 86 Wis. 305; *Foster v. Singer*, 69 id. 392; *Edwards v. Roepke*, 74 id. 575; *Dowling v. Lancashire Ins. Co.* 89 id. 96; *Smith v. Davis*, 1 id. 447; *Keyes v. M. & St. P. R. Co.* 25 id. 691; *Smalley v. Miller*, 71 Iowa, 90; *Godfrey v. Macomber*, 128 Mass. 188; *Grant v. Shaw*, 16 Mass. 341; Drake, Attachment, § 485; Shinn, Attachment & Gar. § 643; Rood, Garnishment, § 52; 8 Am. & Eng. Ency. of Law, 1155, 1157, and cases cited. All of the personal property of the defendant, at the time of the service of the garnishment process herein, was in the actual and absolute possession and control of the sheriff of Dane county. It was his duty to sell said property and apply the proceeds, if any, in payment of the judgment upon which execution issued, and whether any portion of the property so seized, or any of the proceeds of the sale thereof, would ever come into the possession or control of the garnishee depended entirely upon the amount realized from said property at sheriff's sale.

For the respondents there was a brief by *Lewis, Briggs & Dudgeon*, and oral argument by *H. E. Briggs*. They argued, among other things, that the garnishment action was a proceeding *in rem*, and by the judgment property rights were vested in the plaintiffs. It is not within the power of the legislature, by statute, to vacate or annul such judgment, nor did it accomplish such result by the enactment of sec. 2, ch. 334, Laws of 1897. *State v. Atwood*, 11 Wis. 422; *State v. Duff*, 80 id. 13; 3 Am. & Eng. Ency. of Law, 681, 757, 758; *Lancaster v. Barr*, 25 Wis. 560; *Davis v. Menasha*, 21 id. 491; *Atkinson v. Dunlap*, 50 Me. 111; Freeman, Judgments (4th ed.), § 90, and cases cited; Cooley, Const. Lim. (6th

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ed.), 112; *Freiberg v. Singer*, 90 Wis. 611; *Dillon v. Linder*, 36 id. 344.

PINNEY, J. 1. The officer, C. N. Brown, court commissioner, taking the bond of the assignee, *Alford*, did not sign or execute the certificate required by sec. 1696, R. S., to be indorsed on the copy of the assignment, and, as found by the court, at the time of the filing of the said copy of said assignment and of the bond he did not indorse, and at the the time of the service of the affidavit for garnishment and garnishee summons he had not indorsed, on the said copy, his certificate, as required by the statute (R. S. sec. 1696). An unsigned indorsement was not, in any proper sense, a compliance with the statute, and it is not found that the unsigned certificate or indorsement had in fact been indorsed on the copy of the assignment by such officer. That the omission was inadvertent can make no difference. The objection is substantial and fatal to the validity of the assignment. *Fuhrman v. Jones*, 68 Wis. 497; *Grever v. Culver*, 84 Wis. 295; *German Am. Bank v. Devlin*, 96 Wis. 155. The rights of the parties were fixed and adjudged by the judgment in the present cause, given before the curative act (sec. 2, ch. 334, Laws of 1897) became operative, and hence the case does not come within its operation. *Freiberg v. Singer*, 90 Wis. 611; *Dillon v. Linder*, 36 Wis. 344.

2. The circuit court held that the garnishee, *Alford*, was liable, as such, for $674.56, a sum clearly in excess of the amount due on the judgment of the plaintiff. Of the sum of $674.56, with which the garnishee was so charged, was the sum of $269.10 derived by the assignee from the sale of the interest of the assignor in real estate in Madison, sold by the assignee by the direction of the court. As the assignment was void, the assignee held this money for the benefit of the plaintiffs, as creditors of Abbott, the assignor. The remainder of the said sum of $674.56 consists of the proceeds of

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the sale of the personal property of the assignor, Abbott, under the executions by which the sheriff held it at the date of the assignment, amounting to $405.46, $183 of which the sheriff had paid to the garnishee, *Alford*, and $222.46 still remained in the hands of said sheriff, and was found to "belong to said *Alford* as such assignee, and which he was entitled to demand and receive; and that the said *Alford*, garnishee, had no lien or interest in said money or property, as against the plaintiffs." The interest in real property in Trempealeau county had not been sold.

By the statute (R. S. sec. 2768) it is provided that "from the time of the service of the summons upon the garnishee, he shall stand liable to the plaintiff to the amount of the property, moneys, credits and effects in his possession, or under his control, belonging to the defendant, *or in which he shall be interested, to the extent of his right or interest therein.* . . . Any property, moneys, credits and effects, held by a conveyance, or title, void as to the creditors of the defendant, shall be embraced in such liability." The assignment from the defendant Abbott to the garnishee was valid and operative as between the parties to it, and void only as to the plaintiffs and other attacking creditors. As to these plaintiffs, it was still the personal property of their debtor, Abbott, and he had an interest in it which could be taken on execution or reached by garnishee process. Inasmuch as the assignment was void as against the plaintiffs as creditors of the defendant, *Alford*, as assignee and garnishee, held this property or its proceeds received by him by a title void as to the creditors of the defendant Abbott, and he was chargeable on account thereof, as such garnishee, by the plain words of the statute. Full and ample provisions are made for the disposition of property held by a garnishee under circumstances such as are disclosed in the present case. R. S. sec. 2766. There was no occasion to direct a sale. A sale had already been made, and the money, to the amount with

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which the defendant *Alford* has been charged as assignee, had been in fact received by him, and was under his control, and it was necessary only that the court should order it to be paid over according to the rights of the parties.

The judgment of the circuit court is in accordance with the substantial rights of the parties as shown by the finding of the court, and there is nothing to impeach or question the correctness of such finding. It therefore supports the judgment.

By the Court.— The judgment of the circuit court is affirmed.

KRAFT, Respondent, vs. THE CITY OF MADISON, Appellant.

December 13, 1897 — January 11, 1898.

Municipal corporations: Failure of common council to act on claim: Remedies: Election: Mandamus.

1. Under sec. 25, subch. VII, ch. 36, Laws of 1882 (providing that no action shall be maintained against the city of Madison until the claim on which it is based shall have been first presented to the common council for allowance; and that the determination of the council disallowing the claim shall be final and conclusive and a complete bar to any action founded thereon, otherwise than by appeal), failure to act on a claim for five months after its presentation constitutes, presumptively at least, a waiver of the right of the city to be exempt from an action on the claim instituted in the usual way.
2. Although the claimant in such case has a remedy by *mandamus* to compel the council to act on his claim, that remedy is not exclusive, since he might still be put to his appeal and the prosecution of his claim in the circuit court. He may therefore elect to bring his action in the usual way directly against the city.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The plaintiff has a claim against the defendant for work

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done and materials furnished under a contract for the construction of a sewer. He presented his claim to the common council of the defendant, for audit, on October 9, 1896. It was referred to the proper committee of the council, and has not further been acted upon by the common council. The plaintiff commenced this action, for the recovery of the sum claimed, March 9, 1897. The complaint sets out the facts on which the claim is based, its presentation to the common council for audit, its reference to the proper committee, and that no further action has been had thereon by the common council. The city demurred to the complaint on the several grounds (1) that several causes of action had been improperly united; (2) that the complaint failed to state a cause of action; (3) that the court had no jurisdiction, either of the cause of action or of the person of the defendant; and (4) that the plaintiff has not legal capacity to sue. From an order overruling the demurrer the city appeals.

John A. Aylward, city attorney, for the appellant, contended, *inter alia*, that the plaintiff has mistaken his remedy. He should have resorted to *mandamus*, not to an original action in the circuit court. High, Extraordinary Leg. Rem. §§ 31, 32, 323, 324, 338, 346, 348; Dillon, Mun. Corp. (4th ed.), § 832; 14 Am. & Eng. Ency. of Law, 179, 183; *People ex rel. Hunt v. Board of Sup'rs of San Francisco*, 28 Cal. 429; *People ex rel. Hasbrouck v. Board of Sup'rs of New York Co.* 21 How. Pr. 322, 327; *People ex rel. Wilson v. Sup'rs of Albany*, 12 Johns. 414; *State ex rel. Van Vliet v. Wilson*, 17 Wis. 687, 694; *State ex rel. Child v. Smith*, 16 id. 531; *State ex rel. Gill v. Common Council of Watertown*, 9 Wis. 254; *State ex rel. Wolff v. Sup'rs of Sheboygan Co.* 29 id. 79; *State ex rel. Gerke v. Board of Comm'rs*, 26 Ohio St. 369; Merrill, Mandamus, § 225; *People ex rel. Thurston v. Town Auditors of Elmira*, 82 N. Y. 80, 83; *Hull v. Supervisors of Oneida Co.* 19 Johns. 259; *Price v. Sacramento Co.* 6 Cal. 254; *Tilden v. Sup'rs of Sacramento Co.* 41 Cal. 68. Plaintiff having

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treated the claim as disallowed should have taken an appeal and given his bond as the charter requires. Whether this claim was disallowed or not, this was his only remedy. Secs. 25–29, subch. VII, ch. 36, Laws of 1882; *Vogel v. Antigo*, 81 Wis. 642; *Watson v. Appleton*, 62 id. 267; *Fleming v. Appleton*, 55 id. 90; *Sheel v. Appleton*, 49 id. 125; *Koch v. Ashland*, 83 id. 361; *Benton v. Milwaukee*, 50 id. 368; *Drinkwine v. Eau Claire*, 83 id. 428; *West v. Eau Claire*, 89 id. 31; *Wright v. Merrimack*, 52 id. 466; *Chicago & N. W. R. Co. v. Langlade*, 55 id. 116; *Chicago, M. & St. P. R. Co. v. State*, 53 id. 509; *Pier v. Oneida Co.* 93 id. 463; *Van Fracken v. Ft. Howard*, 88 id. 570.

For the respondent there was a brief by *Jones & Stevens*, and oral argument by *B. W. Jones*. They argued, among other things, that where parties are required by statute to present their claims for allowance to councils or boards and the latter neglect or refuse to act, the claimant may, after waiting a reasonable time, resort to the courts of general jurisdiction to maintain his rights. *Buck v. Lockport*; 43 How. Pr. 361; *Smith v. Buffalo*, 44 Hun, 156; *Cummings v. Brooklyn*, 11 Paige, 596; *Van Wert v. School Dist.* 100 Mich. 333; *Dundas v. Lansing*, 75 id. 499; *Whitney v. Port Huron*, 88 id. 268; *Ferguson v. Davis Co.* 57 Iowa, 701; *White v. Polk Co.* 17 id. 413. In several of these cases a shorter time than five months was held an unreasonable delay. Both individuals and cities may waive provisions of this character in contracts or statutes by refusing to take advantage of them. The general jurisdiction of courts over such actions is not taken away, and the provisions are waived unless the defendant promptly takes advantage of them by demurrer or answer. *Benton v. Milwaukee*, 50 Wis. 368; *Owens v. Milwaukee*, 47 id. 461; *Sheels v. Appleton*, 49 id. 125; *Sharp v. Mauston*, 92 id. 629; and the New York cases cited above. If a remedy at all, *mandamus* is not the exclusive remedy. *Sharp v. Mauston*, 92 Wis. 629;

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Guilder v. Otsego, 20 Minn. 74; *Apgar v. School Dist.* 34 N. J. Law, 308; *State ex rel. Van Vliet v. Wilson*, 17 Wis. 687; *Fox Lake v. Fox Lake*, 62 id. 492; *Buck v. Lockport*, 43 How. Pr. 361; *McArthur v. Troy*, 15 N. Y. Weekly Dig. (1882), 4.

NEWMAN, J. The real point in contention is whether the circuit court can get jurisdiction of the cause of action in any way, other than by an appeal from an order of the common council disallowing the claim. The charter of the appellant provides (Laws of 1882, ch. 36, subch. VII, sec. 25) that no action shall be maintained against the city until the claim on which it is based shall have been first presented to the common council for allowance. The determination of the common council disallowing the claim is made final, and a complete bar to any action founded on such claim, otherwise than by an appeal to the circuit court for Dane county as therein provided. Secs. 26–28. The effect of these provisions of the charter is that no action can be maintained until the claim on which it is based has been presented to the common council for allowance. If the claim is allowed, an action upon it is forestalled and unnecessary. If it is disallowed, no action can be instituted for its recovery. The exclusive remedy in that case is the appeal provided by the charter. So it is always within the power of the common council to prevent the institution of an action against the city in the usual way by acting upon the claim. By allowance, it forestalls an action. By disallowance, it substitutes an appeal for the ordinary action. These restrictions on the mode of enforcing claims against the city are of some substantial advantage to the city. The claimant, to make his appeal effectual, must give a bond to indemnify the city against the costs of the appeal. And so the city is protected against the costs of defending against ill-founded or fictitious claims. This protection it can always command by proper action on the claims.

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But there is no provision in the charter for the case of an entire omission of the common council to act upon the claim,—either to allow or to disallow it. The institution of an action in the ordinary way upon the claim in that case is not expressly forbidden by the charter. It would seem that in that case the claimant should be remitted to the ordinary remedy for the enforcement of his right; for surely the ordinary remedies of parties are not taken away, except by express prohibition or very plain implication. These provisions of the charter, being intended for the benefit of the city, can be waived by it. No doubt, the common council is to be allowed a sufficient and reasonable time in which to make audit of the claim. It is entitled to so much time for that purpose as is reasonably necessary to enable it fairly to investigate the facts out of which the claim arises and on which it rests, and to inform itself of its justness and legality. Until the expiration of such reasonable time, the city should not be subject to be harassed by an action. But, by omitting to act upon the claim within such reasonable time, it may fairly be deemed to waive the benefit of its exemption from an action instituted in the usual way. It cannot by inaction stand off the claimant indefinitely.

It would seem that the five months which elapsed between the presentation of the plaintiff's claim to the common council for audit and the time of the commencement of the action was, at least *prima facie*, reasonably sufficient to enable the council to properly investigate and audit the claim. So it is deemed that the complaint states facts which show, at least presumptively, that the common council, by inaction, had waived the right of the city to be exempt from an action on the claim instituted in the usual way.

But it is urged that the claimant had a remedy, by way of *mandamus*, to compel the common council to act upon his claim, and that he was limited to that remedy. Doubtless, that remedy was open to him. But that affords a remedy only by a circuitous route. After *mandamus* had done its

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utmost office, it might easily happen that he would be no nearer to his ultimate recovery. He might still be put to his appeal and a full prosecution of his claim in the circuit court. The law favors directness, rather than circuity, of action. The plaintiff was not limited to the remedy by *mandamus*. He had an election. It was within his election to bring his action in the usual way, directly against the city. *Sharp v. Mauston*, 92 Wis. 629.

By the Court.— The order of the circuit court is affirmed, and the cause is remanded for further proceedings according to law.

TRUSTEES OF ST. CLARA FEMALE ACADEMY OF SINSINAWA MOUND OF THE STATE OF WISCONSIN, Appellant, vs. THE NORTHWESTERN NATIONAL INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, Respondent.

SAME, Respondent, vs. SAME, Appellant.

SAME, Appellant, vs. THE DELAWARE INSURANCE COMPANY, Respondent.

SAME, Respondent, vs. SAME, Appellant.

SAME, Appellant, vs. THE MILWAUKEE MECHANICS' INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, Respondent.

SAME, Respondent, vs. SAME, Appellant.

SAME, Appellant, vs. THE ROCKFORD INSURANCE COMPANY OF ROCKFORD, ILLINOIS, Respondent.

SAME, Respondent, vs. SAME, Appellant.

December 13, 1897 — January 11, 1898.

Insurance against fire: "Unconditional ownership:" Waiver: "Total loss:" Damages: Attorneys' fees.

1. Where an insurance policy contains a provision to the effect that it shall be void if the title of the assured to the property covered by the policy is other than sole and unconditional, if the agent who solicits the insurance, receives and transmits the application, delivers the policy, and receives the premium, knows at the time

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of such delivery that the title of the assured is other than sole and unconditional, the provision in that regard is waived; and such is the case notwithstanding the policy also contains a provision prohibiting the agent from waiving any of its conditions, except in writing thereon or attached thereto.

2. Where such agent knows that the interest of the assured is other than sole and unconditional, and insures the whole title, if the assured has an insurable interest, the recovery on the policy in case of loss is not affected by the mere fact that another person also had an interest therein.

3. When a building has been so damaged as to lose its specific character as such, and it can no longer be called a building, then it is wholly destroyed within the meaning of sec. 1943, R. S.

4. When the structure has been destroyed so as to leave nothing but badly damaged foundation walls, it has been wholly destroyed as a matter of law, within the meaning of the statute referred to.

5. The words "wholly destroyed," as used in the statute, refer to the thing insured, not solely its value.

6. If a building, when in process of construction under an entire building contract which provides that the owner shall insure it in the names of the owner and contractor for such sums from time to time as they may agree upon, loss, if any, payable as their interests shall appear, be insured by such owner in his own name alone, but for a sum intended to cover the entire property, no agreement having been made with the contractor under the terms of the contract, and it be destroyed and thereafter rebuilt by such contractor, the amount recoverable on the policies cannot be diminished:

(a) From the mere fact of such restoration;

(b) In any event, unless the facts showing such restoration solely under the terms of the building contract are pleaded as a defense and established by evidence;

(c) From the fact that some other person whom the assured had a right to represent had an interest in the property.

7. Where separate judgments are rendered against insurance companies joined as defendants, whether originally so joined or thereafter by a consolidation of actions separately brought, the attorney's fees recoverable against each such defendant are limited to $20 under ch. 235, Laws of 1893.

[Syllabus by MARSHALL, J.]

APPEALS from judgments of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed in part; reversed in part.*

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Plaintiffs, while their building was in process of construction by a contractor under an entire contract which contained a provision requiring the owners to insure such building during its construction for the protection of the contractor, in such sums, from time to time, as the owner and the contractor might agree upon, and before any part of the build ing had been accepted except the substructure, applied to defendants' agent for insurance thereon. The agent knew that the building was being constructed under contract, and suggested that the completed building should carry insurance to the amount of $25,000, and that $15,000 of insurance be placed on it in the condition it then was. The whole matter of placing the insurance was then left with the agent, by whom the property was insured under five policies, one of which was issued by each of the companies mentioned at the head of this statement, the aggregate amount of the insurance being $15,000. Thereafter, and when the policies were in force and the building still in process of construction and the relations between plaintiffs and the contractor substantially the same as when the policies were issued, the building was totally destroyed by fire, unless there be some question as to total destruction by reason of there being salvage allowed on the basement. The amount paid for the basement was $3,500; $6,000 additional had been paid to the contractor on the building. The proofs of loss contained a copy of the contract with McAlpine, the builder, and particular reference was made therein to the clause which required the owners to insure the property in their names and that of the contractor, for such sum as should be agreed upon from time to time, to cover the labor and material incorporated into the building, loss, if any, payable to the parties as their interests might appear. The proofs further set forth that McAlpine had an interest in the building at the time of the fire, under the building contract. A separate action was brought against each of the insurance companies

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above named, in which McAlpine was joined as a defendant. The fifth insurance company settled with the plaintiffs. Such proceedings were had in the four actions that they were consolidated under the statute, and the same was dismissed as to McAlpine, it appearing that he had no right of action against the companies. There was no question on the trial but that the foundation of the building was the only part accepted by the plaintiffs before the fire, and that $6,000 was all that had been paid to such contractor in addition to payment for the basement. The evidence was conclusive also that the loss on the basement was $1,926; that the loss on the entire building exceeded the face of the policies.

The court decided, at the close of the evidence, that all the questions of fact were established beyond controversy, leaving only questions of law to be determined in the case, and thereupon decided that the interest of the plaintiffs in the building at the time of the fire, measured by the cost of the basement and that which had been paid on the superstructure, less the salvage on the basement and a proportional amount paid by the fifth insurance company that had settled, was the limit of the amount to be recovered of the other four insurance companies, to be divided between them in proportion to the face of their policies, and on that basis directed verdicts as follows: Against the *Northwestern National Insurance Company* for $2,592.18, with interest thereon from February 16, 1894, and against each of the other insurance companies for $1,296.09, with like interest. Separate verdicts were returned accordingly. Plaintiffs moved the court to direct a verdict in their favor against each of the companies for the full amount of the policies, which was denied. Other motions were made by plaintiffs and by the several defendants, by their respective attorneys, which were denied, and due exceptions taken so as to present here all the questions discussed in the opinion. Judgments were thereupon rendered against each of the defend-

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ants in accordance with the verdicts. An appeal was taken by the plaintiffs from each judgment, and a separate appeal was also taken by each of the defendants.

For the plaintiffs there were briefs by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford* and *J. A. Aylward*. They argued, among other things, that the identity of the building was destroyed. The loss was therefore total, or at least the question should have been submitted to the jury. *Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, 532; *Dick v. Equitable F. & M. Ins. Co.* 92 id. 46, 54; *Seyk v. Millers' Nat. Ins. Co.* 74 id. 67; *Harriman v. Queen Ins. Co.* 49 id. 72, 85; *Williams v. Hartford Ins. Co.* 54 Cal. 450; *Oshkosh P. & P. Co. v. Mercantile Ins. Co.* 31 Fed. Rep. 200; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103; 1 Wood, Fire Ins. § 107. The plaintiffs had an insurable interest in the property at the time the policies were issued, and at the time of the loss. *Sawyer v. Dodge Co. M. Ins. Co.* 37 Wis. 503, 539, 540, 546; *Appleton Iron Co. v. British Am. Ass. Co.* 46 id. 23; *Johannes v. Phenix Ins. Co.* 66 id. 50; *Hooper v. Robinson*, 98 U. S. 528; *Harrison v. Fortlage*, 161 id. 57, 65. Liability to others for destruction of the property confers insurable interest. 1 Wood, Fire Ins. §§ 282, 296; *Berry v. Am. Cent. Ins. Co.* 132 N. Y. 49; *Eastern R. Co. v. Relief F. Ins. Co.* 105 Mass. 570; *Russell v. Union Ins. Co.* 4 Dall. 421; *Wheeler v. Ins. Co.* 101 U. S. 439; *Brugger v. State I. Ins. Co.* 5 Sawyer, 304. If the plaintiffs had an insurable interest the fact that some other person may be equally entitled to the insurance will not affect the liability of the defendants. 1 Wood, Fire Ins. §§ 278, 299; *Bicknell v. Lancaster C. & C. F. Ins. Co.* 58 N. Y. 677; *Insurance Co. v. Chase*, 5 Wall. 509; *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606; *Sturm v. Atlantic M. Ins. Co.* 63 id. 77; *Home Ins. Co. v. Baltimore W. Co.* 93 U. S. 527; *Phœnix Ins. Co. v. Erie & W. Transp. Co.* 117 id. 312; *California Ins. Co. v. Union C. Co.* 133 id. 387. The fact that

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the amount of loss has been received from another does not, in all cases, defeat a recovery from the insurance company, unless the payment arises from contract, to the benefit of which the insurer can properly make claim, and unless such claim is seasonably asserted. 4 Joyce, Ins. § 3742; *People's Ins. Co. v. Straehle*, 2 Cin. Super. Ct. (Ohio), 186; *Commercial U. Ass. Co. v. Scammon*, 126 Ill. 355; *Niagara F. Ins. Co. v. Scammon*, 144 id. 490; *Commercial U. Ass. Co. v. Scammon*, id. 506; *Commercial U. Ass. Co. v. Scammon*, 133 id. 627; *West of Eng. F. Ins. Co. v. Isaacs* [1897], L. R. 1 Q. B. 226.

H. W. Chynoweth, for the defendants, contended, *inter alia*, that the contention of the plaintiffs amounts to this, that, notwithstanding the fact that they have received full indemnification from the contractor, by virtue of the liability he was under to them by reason of the contract between them, they are entitled to indemnification a second time by a recovery on these policies. The fundamental principles governing contracts of insurance are in the teeth of such contention. A policy of fire insurance is a contract of indemnity. *Johannes v. Phenix Ins. Co.* 66 Wis. 50, and case cited. Where there is a contract of indemnity and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay. *Burnand v. Rodocanachi, Sons & Co.* 7 App. Cas. 333, 339; *Castellain v. Preston*, 11 Q. B. Div. 380; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 88; *Flannagan v. Camden Mut. F. Ins. Co.* 25 N. J. Law, 506; *Pentz v. Ætna F. Ins. Co.* 9 Paige, 568; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 503; *Franklin F. Ins. Co. v. Hamill*, 6 Gill (Md.), 87; *Illinois Mut. F. Ins. Co. v. Andes Ins. Co.* 67 Ill. 362; *Security Ins. Co. v. Farrell*, 2 Ins. L. J. 302; *United Ins. Co. v. Robinson*, 2 Caines, 280; May, Ins. §§ 2, 7, 456*a*; Porter, Ins. 1, 2, 221; Wood, Fire Ins. §§ 117, 502, 503; *Friemansdorf v. Watertown Ins. Co.* 9 Biss. 167; 4

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Joyce, Ins. § 3541; *Dilling v. Draemel*, 30 N. Y. St. Rep. 435; Sheldon, Subrogation, § 222; *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285; *Carstairs v. Mechanics' & T. Ins. Co.* 18 Fed. Rep. 473; *Commercial U. Ass. Co. v. Lister*, L. R. 9 Ch. App. 483; *Smidmore v. Australian G. L. Co.* 2 N. S. W. 219.

For the defendant *Delaware Ins. Co.* there were briefs by *F. J. & C. F. Lamb*, and oral argument by *F. J. Lamb*. They contended, *inter alia*, that McAlpine was owner of and had ownership in the structure above the basement until completed and ready for delivery. *Marshall v. Pearce*, 34 La. Ann. 559; *Goodman v. Baerlocher*, 88 Wis. 287; *Tompkins v. Dudley*, 25 N. Y. 272; *Mucklow v. Mangles*, 1 Taunt. 318; *Merritt v. Johnson*, 7 Johns. 473; *Andrews v. Durant*, 11 N. Y. 35; *Adams v. Nichols*, 19 Pick. 275; *Cushing v. Williamsburg C. F. Ins. Co.* 4 Wash. 538. The policy cannot be extended to cover any interest of McAlpine, or other interest of the sisters than sole and unconditional ownership, because by its express provisions any such interest, if established, would avoid the policy.

MARSHALL, J. The questions presented on these appeals are: (1) Were the policies void because of a breach of the condition in respect to the title of the assured being sole and unconditional? (2) If the condition in that regard was waived, did the policies cover the entire building, or only the interest of the plaintiffs? (3) What is the amount for which the defendants were liable under the policies? (4) Has such amount been diminished by the completion of the building by the contractor under his obligation so to do? (5) Did the court err in not limiting the attorney's fees taxed and included in each judgment to $20? These questions will be considered in their order.

1. No question is raised but that H. B. Hobbins, who took the application for the insurance, received the premiums, and delivered the policies, was the agent of defendants within

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the meaning of sec. 1977, R. S., and competent at the time the policies were delivered to waive the condition therein in respect to title, notwithstanding the clause prohibiting any waiver of the conditions or provisions of the policies except in writing thereon or attached thereto. The law in that regard is firmly established, and nowhere more so than by the decisions of this court. *Renier v. Dwelling House Ins. Co.* 74 Wis. 89; *Goss v. Agricultural Ins. Co.* 92 Wis. 233; *Carey v. German Am. Ins. Co.* 84 Wis. 80; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63. Such decisions, and numerous others, are to the effect that if the agent delivers a policy of insurance and receives the premium, with knowledge that the title to the property insured is other than sole and unconditional, it is in effect the act of the company and constitutes an effectual waiver of the conditions in that regard. Such cases rule this, as there is no reasonable controversy but that Hobbins knew substantially all the facts in regard to the interest of the contractor, McAlpine, in the building, which is the only interest claimed to have existed in breach of the condition under consideration. True, there is no direct evidence that Hobbins knew the exact terms of the building contract, but he knew that the construction of the building was going on under contract with McAlpine, and advised plaintiffs to insure it to the full amount of $15,000, because, as he said, he did not know McAlpine. There is no reasonable explanation of this other than that the agent assumed that the contract was entire, but that, in his judgment, plaintiffs should insure the building in their own names for all it would carry, for their protection, independent of the liability of the contractor, "because he (Hobbins) did not know him." That shows, if it shows anything, that the agent knew that the contractor had a builder's interest in the structure, and that his opinion in that regard would not have been more definite if he had seen and read the contract. The trial court was right in considering such facts established conclusively by

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the evidence, and holding the policies binding on defendants, freed from the condition in respect to the title.

2. The question of whether the whole building was insured, or only the interest of plaintiffs, is practically answered by what has preceded. The claim that the intention was to insure only that part of the building which had been accepted, that is, the foundation, is without any evidence or a single circumstance in the case to support it, except the testimony of the agent Hobbins that he was not requested, and did not intend, to insure the builder's interest. That was his conclusion, which counts for nothing in the case as against what was actually said and done. He testified that the plaintiffs applied for $20,000 of insurance; that he influenced them to make it $25,000; that he inquired who the contractor was, and on being informed in that regard said he did not know him and would advise plaintiffs to insure the building then; that his language was: "I told them I would bind that amount of insurance on the building in the condition it then was;" that thereupon the whole matter was left to him, and he placed the $15,000 of insurance and agreed to place $10,000 additional when the building was nearer completion. In view of that evidence, the fact stands out prominently and beyond reasonable dispute that Hobbins and plaintiffs intended to insure the entire building at a valuation of $15,000 as it stood when the policies were issued.

3. On the question of whether the building was wholly destroyed, the evidence appears to be quite as conclusive as on the other questions discussed. It was practically annihilated down to the foundation, and that was so injured that about half of the original cost was required to put it in shape for use again. A considerable portion of it had to be removed down to the footing stones, and the balance required extensive repairs. As a matter of law that was a total destruction of the building within the meaning of sec. 1943,

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R. S., which provides that when real property, covered by insurance, "shall be wholly destroyed, . . . the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed." That statute has been several times construed heretofore, and most recently in *Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, where it was held, in effect, that total loss under the statute does not mean that the material of which the building is composed shall be annihilated or reduced to a shapeless mass; that when the identity of the structure as a building is destroyed, so that its specific character as such no longer remains and there is nothing left but the cellar walls and a dilapidated foundation, the loss is total within the meaning of the statute. There are many authorities elsewhere to the same effect, and it is so laid down by standard text writers.

In May, Ins. § 421*a*, it is said that 'total loss exists when the building has lost its identity as such, so that it cannot be designated as a building, though some part of it may yet be standing.' In *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, it was said, in effect, that total loss does not mean an absolute extinction of the building; that the test is whether the building has lost its identity and specific character, so that it can be no longer called a building. To the same effect are *Williams v. Hartford Ins. Co.* 54 Cal. 450, Beach, Ins. § 1291, and Wood, Fire Ins. § 107. In *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* 31 Fed. Rep. 200, the term "wholly destroyed," as used in our statute, was considered and construed as not meaning more than such destruction of the building as that, though some part still remains standing, it cannot be longer designated as a building. Evidently, from the report of the case, some part of the building covered by the policy under consideration was left standing after the fire; yet, as there was no con-

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troversy but that such part was not sufficient to constitute, in any sense, a building, the court held as a matter of law that such building was wholly destroyed and the loss total.

There are authorities to the effect that if there is any part of the building left, worth more in place than the cost of removing it, the destruction is not complete within the meaning of valued policy statutes. In Ostrander's work on Fire Insurance [2d ed., § 310] and in an article on the subject found in 33 Cent. L. J. 319, written by a prominent member of the bar of this court, it is contended that such is the correct construction of our statute, and that this court has impliedly, if not directly, so held, and referred the words "totally destroyed" to the value of the thing insured instead of the thing itself. It is not considered that there is any legitimate warrant for such view in anything said by the court in its published opinions. In *Harriman v. Queen Ins. Co.* 49 Wis. 71, where the building was destroyed down to the foundation, and that was injured so as not to be in a suitable condition for use in a new building, the court said, the destruction, within the meaning of the statute, was total, but declined to lay down any rule applicable to other cases, and did not place the decision on the theory that the destruction contemplated by the statute was solely that of value. In *Seyk v. Millers' Nat. Ins. Co.* 74 Wis. 67, while it was stated that there was no part of the building left standing, of any value, the decision that the destruction was total was placed on the ground that *the identity of the thing insured was so far annihilated that it no longer existed as a building.* The authority referred to and approved was Wood, Fire Ins., *supra*, to which one of the cases cited is *Harriman v. Queen Ins. Co., supra.* The text writer says: "Loss is total within the meaning of the term when the identity and specific character of the thing insured is destroyed, although there is not an absolute extinction of the parts." As best illustrating the rule, *Judah v. Randal*, 2 Caines, Cas. 324,

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is cited, where the property insured was a carriage. It was all destroyed but the wheels. The court held that the destruction was complete as applied to the specific thing insured, the carriage. That was followed in *Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, as the settled doctrine of this court. Our statute deals with the specific thing insured, not solely the value. Its purpose was not only to prevent frauds by overinsurance, but to remove the temptation, on the part of insurance companies, to demand and secure settlements for losses for less than the amounts called for by the contracts of insurance, where the structures insured have been, as such, substantially destroyed. To hold that, notwithstanding the statute, salvage can be claimed for any value left after a fire, even down to the footing stones of foundation walls, would be contrary to the uniform holding of this court on the subject, and of courts elsewhere under similar statutes, and would render the statute ineffectual to accomplish what it was designed to accomplish.

It follows from the foregoing that the evidence in this case establishes conclusively a case of total destruction of the building within the meaning of our statute; hence that the amount named in the policies of insurance correctly measured the plaintiffs' damages at the time of the fire.

4. But it is said the policies of insurance were contracts of indemnity, and as the builder, McAlpine, was bound to reconstruct the building after the fire, and did so, plaintiffs were fully indemnified except as to the foundation, which was accepted before the policies were issued, and cannot recover in excess of the loss for which indemnity has not been received. The weakness of this contention is threefold:

(a) The mere fact that the building was restored by the contractor does not show that such restoration was pursuant to the obligation of the building contract, independent of any claim for indemnity by the contractor against the

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plaintiffs on account of the insurance clause in such contract, and the insurance of the building by them for an amount sufficient to cover the entire title thereto, including the interest of plaintiffs and such contractor. It was as competent for the builder to waive the provision that the insurance should be in his and the owners' names, loss payable to the parties as their interests might appear, as it was for the defendants to waive the condition of the policies against sole and unconditional ownership. Again, it was competent for plaintiffs to insure the whole building in their own names by the consent of the builder, notwithstanding the terms of the building contract provided otherwise, and such consent could have been given expressly or by implication. So the whole question between the plaintiffs and the builder, McAlpine, so far as appears from any proof in the case, is open.

(b) If the plaintiffs were indemnified by their contractor under his obligation to complete the building, and the defendants desired to rely upon that fact to reduce the damages otherwise recoverable under the policies, they should have set up such facts in the answers as a defense, and established them by evidence on the trial. No such defense appears to have been so pleaded or established, so the policies must stand unaffected by any claim for a reduction of the recovery thereon by reason of any claim that the plaintiffs have been otherwise indemnified.

(c) It being conceded that the plaintiffs had an insurable interest, and it having been decided that the condition in the policies in respect to sole and unconditional ownership was waived, and that the undisputed evidence makes a case of total destruction of the property insured, calling for payment of the face value of the policies as liquidated damages, that amount cannot be diminished by the fact alone that some other person, whom the plaintiffs had a right to represent, also had an interest in the building, even though such

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person was required by contract to reconstruct such building. It is well settled that in the absence of fraud or mistake, unless otherwise provided by the contract of insurance, if the insured has some insurable interest in the property covered by such contract, the whole amount of damages to the property, not exceeding that named in the policy, is recoverable by such person if the damages thereto reach that sum, or if, by the contract itself and the law governing the subject, the face value of the policy must be taken as liquidated damages. *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Trade Ins. Co. v. Barracliff*, 45 N. J. Law, 543.

5. Plaintiffs claimed the right to recover $20 attorney's fees, under ch. 235, Laws of 1893, and $25 under the general fee bill as well, against each defendant, and prevailed on such claim. That is assigned as error. Such chapter provides that several insurance companies, interested in the same loss, may be joined as defendants; that in case of a recovery against them, separate verdicts and judgments shall be rendered; and that there shall be included in each such judgment an attorney's fee of $20. In a proper case for such joinder of defendants, if separate actions are brought, they may be consolidated on motion, under sec. 2792, R. S. *Gross v. Milwaukee Mechanics' Ins. Co.* 92 Wis. 656. When so consolidated, the provisions of the act of 1893 as to costs apply, the same as if one action had been brought against all in the first instance, as permitted by law. It is considered that such provisions are exclusive and limit the attorney's fee to $20 against each defendant, and that the ruling of the trial court to the contrary was error.

It follows from the foregoing that each of the insurance companies is liable to the plaintiffs for the full amount mentioned in its contract of insurance, and that the trial court should have directed verdicts accordingly, at the close of the evidence, on plaintiffs' motion therefor. But, in accord-

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ance with the established practice of this court where there is no verdict left undisturbed by the result here upon which a judgment can be rendered when the case again reaches the trial court, the judgments appealed from must be reversed on plaintiffs' appeals as to damages, and on defendants' appeals as to costs, and the cause be remanded for a new trial.

By the Court.— On plaintiffs' appeals the judgments are reversed as to damages, and on defendants' appeals such judgments are reversed as to costs. Full costs are allowed to plaintiffs in this court on their appeals, except that only one fourth of the costs for printing their case and brief shall be taxed on each appeal. Defendants are allowed clerk's fees on their respective appeals, but no other costs.

ROGERS, Respondent, vs. SHOVE and wife, Appellants: SCHUETTE and another, Interveners.

December 14, 1897 — January 11, 1898.

Appeal: Notice: Adverse parties.

On appeal by a mortgagor from an order confirming a sheriff's report of sale on foreclosure, the purchaser is the principal adverse party, and must be served with the notice of appeal, under sec. 3049, R. S.

APPEAL from a judgment of the circuit court for Manitowoc county: N. S. GILSON, Circuit Judge. The interveners moved to dismiss the appeal. *Motion granted.*

J. S. Anderson, for the motion.

[No appearance for the appellants.]

PER CURIAM. This is a motion to dismiss an appeal from an order confirming a sheriff's report of sale in foreclosure.

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The appeal was taken by the defendants *Shove*, the mortgagors, by serving the notice of appeal and bond upon the plaintiff in the action, only, and not upon the defendants *Schuette*, who were the purchasers upon the sale, and who appeared by attorney in the court below upon the motion to confirm the report. This motion is made by the purchasers at the foreclosure sale, on the ground that the appeal papers should also have been served upon them or their attorney.

The point is unquestionably well taken. The purchaser of real estate at foreclosure sale becomes a *quasi* party to the action, so far as the proceedings to confirm the sale are concerned, and may appeal from orders affecting his right to such confirmation. *Ward v. Clark*, 6 Wis. 509; *Kneeland v. Am. L. & T. Co.* 136 U. S. 89. Upon all motions affecting that right, he is undoubtedly "the adverse party;" and, if he has the right to appeal from orders denying confirmation, the converse naturally follows, namely, that he is entitled to service of the notice of appeal from the order of confirmation when such appeal is taken by other parties. The statute provides that an appeal is to be taken by serving the notice of appeal "on the adverse party," and on the clerk of the court. R. S. sec. 3049. In case of such an appeal as the one before us, the purchaser is unquestionably the principal "adverse party," and must be served with the notice. *Barnes v. Stoughton*, 6 Hun, 254.

Appeal dismissed.

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BROWN, Executor, Appellant, vs. THE CITY OF BARABOO, Respondent.

December 14, 1897 — January 11, 1898.

(1, 2) *Plats of land: Highways: Dedication: User: Deeds.* (3) *Limitations: Tenants in common.*

1. Upon a recorded plat a strip of land south of and adjoining a river was marked "reserved for private use." South of said strip was block 7, on the east side of which was Walnut street and on the west side Vine street. Upon the plat said streets extended only to the reserved strip, but in fact Vine street was used as a public street to the river. A deed of a portion of said reserved strip described the premises conveyed as bounded "on the east by Walnut street, on the south by block No. 7, on the west by Vine street, and on the north by the center of" the river. *Held*, that the grantee in such deed took title to the center of Vine street extended, subject to the public easement; and that a conveyance of all the remainder of said reserved strip included the west half of Vine street.
2. On the north side of the river, the plat extended to the town line. North of said line was another plat in which Oak street was in direct line with Vine street. Water street ran east and west along the south side of blocks 1, 2, and 3, but the south line of the western portion of said street, through which Vine street would run if extended across the river, was not designated, there being no lots between Water street and the river at that place. Two streets entered the eastern portion of Water street from the south, and three entered the street from the north, one of the latter, the name of which was not designated, being in direct line with Vine and Oak streets. The plat stated that all streets were sixty-six feet wide. *Held*, that the recording of said plat and the public use of the unnamed street, and of Water street along said three blocks, for more than forty years, constituted a dedication of such streets to the public, notwithstanding a requirement that plats should "particularly describe and set forth all streets . . . giving names, width, courses, boundaries, and extent."
3. Lands descended to a husband and wife as tenants in common. The wife died leaving as her heirs several children, some of whom were married women, to whom her interest descended subject to the husband's estate by the curtesy. The husband thereafter executed a warranty deed of the whole premises purporting to convey the

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whole title, and the grantee went into possession. In 1863 the husband died. *Held*, that the ten-years statute of limitation commenced to run against the heirs of the wife, not under disability, upon the death of the husband, and against the married women upon the enactment of ch. 29, Laws of 1872, removing the disability of coverture. An action by said heirs to recover possession of their interest in the premises, which was not commenced until 1892, was therefore barred.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an action of ejectment, and was commenced by William Brown, October 10, 1892, to recover an undivided four-tenths of an undivided one-half of a strip of land in *Baraboo*, four rods wide and forty rods long, and extending from the town line, at the south end of Oak street, south, across Water street, the Baraboo river, the mill race, and the reservation, to the north end of Vine street, as indicated on the old plat of the village of Baraboo, the east and west sides of said strip being in line with the east and west sides, respectively, of Oak and Vine streets extended. Issue being joined and trial had, the referee found in favor of the defendant, and the court confirmed such findings, and from the judgment entered thereon accordingly William Brown brought this appeal. Pending the appeal the death of William Brown has been suggested and the cause continued in the name of his executor, *Benjamin F. Brown.*

The facts in this case, as so found or undisputed, are in effect as follows:

One George W. Brown, under whom the plaintiff claims title, September 29, 1846, became seised in fee of the E. ½ of the N. E. ¼ of section No. 2, in township No. 11 N., of range No. 6 E., in the county of Sauk. Said eighty acres include the strip of land in question, and extend north to the town line mentioned. George W. Brown conveyed, by warranty deed, to Delando Pratt and L. and J. Hayes, a piece of land and water rights, by metes and bounds, between the said

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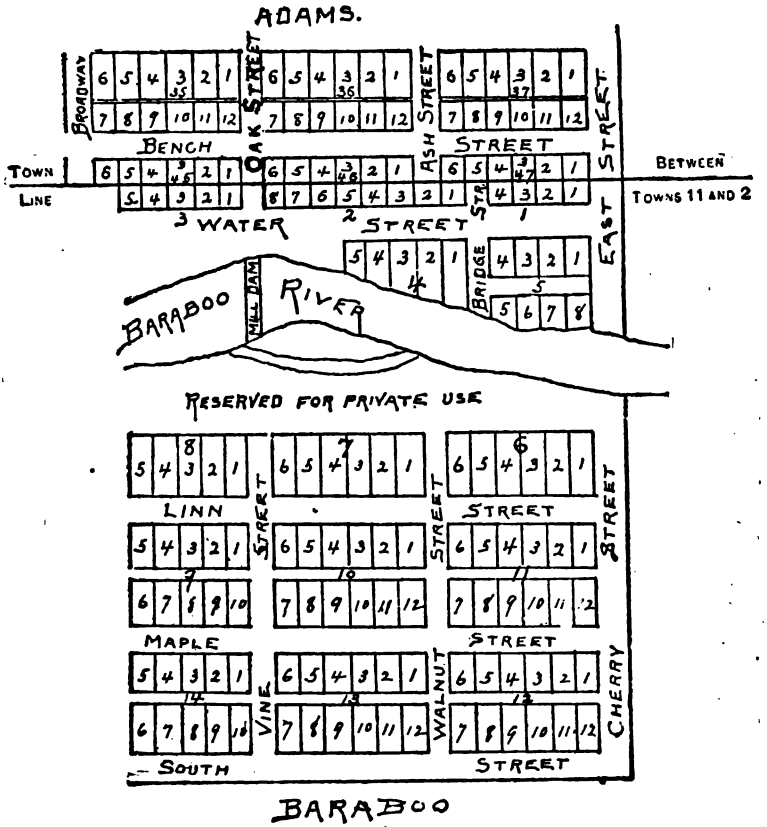
mill race and the river. The said George W. Brown, November 1, 1847, platted a portion of said premises, the said plat being designated as the Village of Baraboo, substantially as follows:



The said George W. Brown, by the said plat, dedicated to the public, as a public street, all that portion of the land and premises in the complaint herein specified and referred to which lies north of the south line of Water street, as designated on said plat of the village of Baraboo. November 24, 1847, the said George W. Brown sold and conveyed to

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one Philarmon Pratt, his heirs and assigns, the following described premises, situated, lying, and being in Baraboo, in the county of Sauk, aforesaid, and bounded as follows, to wit: "On the east by Walnut street, on the south by block number 7, on the west by Vine street, . . . and on the north by the center of Baraboo river, together with the sawmill and the south one-half of the dam and one half of the water privileges and other privileges and appurtenances to the said piece or parcel of land belonging; *also all the land lying between the present race and the Baraboo river*, excepting a piece of land and right of water . . . conveyed by deed to Delando Pratt, Louis Hayes, and Josiah Hayes," aforesaid. At the time of the execution and delivery of the deed to Philarmon Pratt, Vine street, as delineated upon the plat, did not extend north beyond the north line of block No. 7, but in fact, at the time of such conveyance, the said Vine street extended north to the mill race on the south side of the Baraboo river; that is, the four-rod strip (included in the complaint herein) lying immediately north of the north limit of Vine street, as delineated upon the said plat of Baraboo, at the time of the conveyance to Philarmon Pratt, was used by the public as and for a public street as far north as the mill race on the south side of the Baraboo river, and the lands by the said George W. Brown so conveyed to said Philarmon Pratt were in and by the deed bounded on the west by such street.

George W. Brown died intestate, without issue, and unmarried, December 15, 1847, being at the time twenty-eight years of age, leaving him surviving his father, Chauncey Brown, and his mother, Clarissa Brown, as his only heirs at law. At the time of his death he was seised of that portion of the said four-rod strip of land, in the complaint specified, which lies between the middle or center line of the Baraboo river and the south line of Water street, together with other lands not specified in the complaint. The said Chauncey

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Brown and Clarissa Brown, upon the death of George W. Brown, entered into the possession of all the lands and premises of which George W. Brown died seised, and remained in the possession thereof until the death of Clarissa Brown, February 26, 1854, excepting only such portions thereof as had been sold by the administrators of the estate of George W. Brown, the same being wholly outside of the lands in the complaint specified. Clarissa Brown died intestate February 26, 1854, leaving her surviving her husband, Chauncey Brown, and nine children, to wit, Lura Blake, Martha Langdon, William Brown (plaintiff), Emeline Kelsey, Franklin Brown, Warren Brown, Edwin Brown, Adeline Bellis, and Chauncey Brown, Jr. Polly Martin predeceased her mother, Clarissa Brown, but as she left surviving children her interest descended to her children. The above named are the only heirs at law of Clarissa Brown.

After the death of Clarissa Brown, Chauncey Brown was, and until August 28, 1854, remained, in the possession of all the said lands and premises of which George W. Brown died seised, excepting only such portion thereof as had been sold by the administrators of George, the same being wholly outside of the lands specified in the complaint. Chauncey Brown, August 28, 1854, sold, and by warranty deed conveyed, to Joseph Sanford and Patrick Bassett, all of the said lands and premises of which the said George W. Brown died seised, excepting only such portion thereof as had been so sold by the administrators of said George. Said deed of Chauncey Brown purported upon its face to convey the whole title to the lands therein described, and was by the said grantees thereto understood to convey the whole title thereto, and the same was received and accepted by Sanford and Bassett as being a conveyance to them of the full title to said lands. Sanford and Bassett entered into the immediate possession of the lands and premises in the said deed mentioned and described, and of the whole thereof, and ever since August 28,

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1854, the said Sanford and Bassett, and their grantees, have been in the actual, open, visible, notorious, and exclusive possession of said lands and premises, and of the whole thereof, and such title remained undisputed until the time of the commencement of this action, October 10, 1892. The lands sold and conveyed by the said George W. Brown in his lifetime, together with the lands included in said deed to Sanford and Bassett, included all the lands specified and referred to in the complaint. Neither the said William Brown, nor his ancestors, predecessors, or grantors, have been in the possession of the said premises specified and described in the deed to Sanford and Bassett, including all the lands in the complaint herein claimed, excepting only such lands as had been previously sold and conveyed by George W. Brown in his lifetime, since August 28, 1854. Chauncey Brown died September 26, 1863. At the time of the death of Chauncey Brown, William Brown (plaintiff) was under no legal disability, and since said time has been under no legal disability. The grantors of William Brown, to wit, Franklin Brown, Martha Langdon, and Lura Blake, at the time of the death of Chauncey Brown, were under no legal disability, and since said time have been under no legal disability, excepting only that Lura Blake and Martha Langdon, at the time of the death of Chauncey Brown, were, and ever since said time have been, married women. All of the lands in the complaint specified are now used as public streets in the city of *Baraboo*, and have been for more than forty years.

As conclusions of law the court finds, in effect: That, upon the death of George W. Brown, all the lands of which he died seised descended equally to his father and mother, Chauncey and Clarissa Brown, as tenants in common. That upon the death of Clarissa Brown her interest in and to said real estate descended to her heirs at law, to wit, her husband, Chauncey Brown, as tenant by curtesy, and to her said

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children, taking title thereto subject to such life estate. That, by the warranty deed executed and delivered by Chauncey Brown to Sanford and Bassett, he conveyed to them all the right, title, and interest which he, the said Chauncey Brown, then had in and to said premises. That the entry and possession of Sanford and Bassett under that deed became and was adverse to all the world, except as to the remaindermen, during the continuance of the life estate of the said Chauncey Brown therein. That, upon the death of the said Chauncey Brown, the holding and possession of the said premises by Sanford and Bassett became and were adverse to said remaindermen not under legal disability. That the said William Brown and Franklin Brown, not being under any disability at the time of the death of Chauncey Brown, became and were barred of all right, title, claim, and interest in and to said premises, including the premises specified in the complaint herein, not previously sold by George W. Brown in his lifetime, ten years after the time of Chauncey Brown's death, and before the time of the commencement of this action. That the heirs of the said Clarissa Brown under the disability of coverture at the time of the death of Chauncey Brown, to wit, Lura Blake and Martha Langdon, became and were barred of all right, title, claim, and interest in and to the said lands in the complaint specified, not conveyed by George W. Brown in his lifetime, ten years after ch. 29, Laws of 1872, went into effect, to wit, March 2, 1882. That at the time of the commencement of this action, William Brown had no right, title, claim, or interest in or to the lands or premises specified in the complaint, nor in any part or portion thereof. That the defendant is entitled to judgment herein in its favor, and for its costs and disbursements in this action.

From the judgment entered upon such findings in favor of the defendant, William Brown appealed.

For the appellant there was a brief by *William Brown*,

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pro se, and *Herman Grotophorst*, of counsel, and oral argument by *Mr. Grotophorst*. They contended, *inter alia*, that Chauncey Brown and Clarissa Brown were tenants in common. Upon the death of the latter her heirs took her title immediately and thus became tenants in common with the former. A deed by one tenant in common purporting to convey the whole premises is inoperative and void as against his cotenant. 4 Kent, Comm. 368; *Porter v. Hill*, 9 Mass. 34. By the deed from Chauncey Brown, his grantees became tenants in common with the heirs of Clarissa Brown. Under such circumstances the statute will not begin to run until an adverse holding is declared and notice thereof given to the holder of the legal title. *Neilson v. Grignon*, 85 Wis. 550; *Allen v. Allen*, 58 id. 202; *Bartlett v. Secor*, 56 id. 520; *Roebke v. Andrews*, 26 id. 311; *Schwallback v. C., M. & St. P. R. Co.* 69 id. 292; *Sydnor v. Palmer*, 29 id. 226; *Watts v. Owens*, 62 id. 512; *Stewart v. Stewart*, 83 id. 364; *Culver v. Rhodes*, 87 N. Y. 348. There must be some notorious act of ouster brought home to the knowledge of the cotenant, a silent possession being insufficient. *Challefoux v. Ducharme*, 4 Wis. 554; *Lessee of Clymer v. Dawkins*, 3 How. 674; *McClung v. Ross*, 5 Wheat. 116; *Kirk v. Smith*, 9 id. 241. A deed conveying land to the center of a street which has never been legally laid out does not constitute a dedication of such street to the public. *Hawthorne v. Myers*, 37 S. W. Rep. 593. The dam upon which the work was done is entirely outside the line of Vine street, and the bridge is a rod or two west of the premises in question. Any travel was done in line with the bridge and outside, or on the extreme limit, of the premises in question. These facts do not constitute the strip a highway by user. *Speir v. New Utrecht*, 121 N. Y. 420; *Cunningham v. Hendricks*, 89 Wis. 632; *Mahler v. Brumder*, 92 id. 477; *Holdane v. Cold Spring*, 21 N. Y. 474; *Fonda v. Borst*, 2 Keyes, 48; *Niagara Falls S. B. Co. v. Bachman*, 66 N. Y. 261; *People v. Underhill*, 144

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id. 324; *Connehan v. Ford*, 9 Wis. 240; *Hanson v. Taylor*, 23 id. 547; *Eastland v. Fogo*, 66 id. 133; *Gardiner v. Tisdale*, 2 id. 153; *State ex rel. Lightfoot v. McCabe*, 74 id. 481; *Tupper v. Huson*, 46 id. 646; *Strong v. Brooklyn*, 68 N. Y. 1; *Pentland v. Keep*, 41 Wis. 490; *Fischer v. Laack*, 76 id. 313; *Dolphin v. Pedley*, 27 id. 469.

R. D. Evans, for the respondent, argued, among other things, that the heirs of Clarissa Brown became barred by the statute ten years after the death of Chauncey Brown, or ten years after the enactment of ch. 29, Laws of 1872. *Wiesner v. Zaun*, 39 Wis. 188; *Barrett v. Stradl*, 73 id. 385, 9 Am. St. Rep. 795; *Jackson v. Harsen*, 7 Cow. 323, 17 Am. Dec. 517; *Mettler v. Miller*, 129 Ill. 642; *Rohn v. Harris*, 130 id. 525; *Berry v. Hall*, 11 Ky. L. Rep. 30; *Gindrat v. Western R. Co.* 19 L. R. A. 839, 852, note. A conveyance by one cotenant of the entire estate gives color of title, and if possession is taken under it, the grantee claiming title to the whole, it amounts to an ouster of the cotenants, and the possession of the grantee is adverse to them. *Sydnor v. Palmer*, 29 Wis. 226; *Frick v. Sinon*, 75 Cal. 337, 7 Am. St. Rep. 177; *King v. Carmichael*, 136 Ind. 20; *Rutter v. Small*, 68 Md. 133; *Parker v. Proprietors of Merrimack Canal*, 3 Met. 91, 37 Am. Dec. 121; *Town v. Needham*, 3 Paige, 545, 24 Am. Dec. 246; *Baker v. Oakwood*, 123 N. Y. 16; *Dikeman v. Parrish*, 6 Pa. St. 210, 47 Am. Dec. 455; 1 Am. & Eng. Ency. of Law (2d ed.), 806.

CASSODAY, C. J. 1. Counsel contends that the defendant did not get title to any portion of the strip of land in question by virtue of any deed made by George W. Brown in his lifetime. The material question is whether George W. Brown, by such deed or deeds, parted with the title to any portion of such strip of land. If he did, then as to such portion his parents took no title. It is a cardinal principle in actions of ejectment that the plaintiff must recover, if at all,

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on the strength of his own title, and not upon the weakness or want of title in the defendant. *Kelley v. McKeon*, 67 Wis. 561, and cases there cited. He must establish such title as against the world, or as against the defendant as a wrong-doer. *Id.* "It is an action to try the title and right to the possession of land. More accurately, it is an action to determine the *plaintiff's* title and his right to the possession." *Baldwin v. Ely*, 66 Wis. 177.

Conceding that the words in the deed from George W. Brown to Philarmon Pratt, "all the land lying between the present race and the Baraboo river," were erased before the execution of that deed, as contended by counsel, yet it does not follow that George W. Brown did not, in his lifetime, part with all title to that portion of the strip in question which lies between the mill race and the center of the river, since the deed from him to Delando Pratt and L. and J. Hayes was, manifestly, of land between the mill race and the river, as the same was "situated at the south end of the said George W. Brown's mill dam." That dam, as appears from the plats in evidence, was in line with Vine street and Oak street extended. The land conveyed to Delando Pratt and L. and J. Hayes was expressly excepted from such conveyance to Philarmon Pratt; and the erasures mentioned may have been, and probably were, so made, because otherwise they would have included the lands thus excepted. The contention that the land bounded by the river did not extend to the center of the river is certainly without foundation. *Norcross v. Griffiths*, 65 Wis. 599. But, independent of that, the land so conveyed to Philarmon Pratt was bounded "on the east by Walnut street, on the south by block number 7, on the west by Vine street," and "on the north by the center of the Baraboo river," and conveyed "the sawmill and the south half of the dam." The land so conveyed is a portion of the land marked on the plat as "reserved for private use;" and although bounded

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on the east by Walnut street, and on the west by Vine street, yet neither of those streets appears upon the plat as extending north of block 7. Nevertheless, the grantee in that deed, and those claiming under him, thereby acquired the right, as against the grantor and those claiming under him, to treat each and both of these streets as extending north to the river; and it is established by the evidence that at the time of making the deed Vine street was being used by the public as and for a public street, four rods wide, from blocks 7 and 8, as far north as the mill race; and that such use by the public has continued ever since, and that for more than forty years Vine street, so extended, has been used by the public, as and for a public street, as far north as the river. There can be no question but that Pratt, as such grantee, took title to the center of Vine street, so extended to the river, subject, however, to the public easement. "It is the settled doctrine in this state that the grantee of a lot in a recorded plat, except where the terms of his deed or the plat expressly exclude that construction, takes to the center of adjoining public ways, subject to the public easement; and the fact that the description in his deed, after stating the number of his lot, gives its dimensions as they are exclusive of the highway, does not affect the construction." *Pettibone v. Hamilton*, 40 Wis. 402; *Jarstadt v. Morgan*, 48 Wis. 245; *Andrews v. Youmans*, 78 Wis. 56; *Johnson & Co. v. Arnold*, 91 Ga. 659.

2. The warranty deed of August 28, 1854, from Chauncey Brown to Sanford and Bassett, mentioned in the foregoing statement, covered and purported to convey the absolute title to "all of the mill reservation along Water street and south to the Baraboo river, together with the water power and reservation on the south side of the Baraboo river, all of that piece of land lying north of the north line of blocks number 6, 7, and 8, and south of the Baraboo river." This included the west half of Vine street, so extended north

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from blocks 7 and 8 to the center of the Baraboo river, and in fact the whole of that street so extended from these blocks north to Water street, designated on the plat. It is conceded that that deed conveyed the undivided one-half of all the lands described therein, and of which George W. Brown died seised,— as all the lands of which he so died seised descended to his father and mother equally, as tenants in common. *Brown v. Baraboo*, 90 Wis. 151. The mother having died intestate prior to the deed so given to Sanford and Bassett, her moiety of such lands descended to her heirs at law, subject to an estate for life in her husband, Chauncey Brown, as tenant thereof by the curtesy. R. S. 1858, ch. 89, sec. 30; R. S. 1878, sec. 2180. As such life estate terminated on the death of Chauncey Brown, it follows that the legal title and right to the possession of the several interests of William Brown, Franklin Brown, Martha Langdon, and Lura Blake, under whom the plaintiff claims title, representing four tenths of one half of so much of the strip of land in question as George W. Brown died seised of, became absolutely vested in them, severally, September 26, 1863. And yet it is undisputed that August 28, 1854, Sanford and Bassett, under such warranty deed to them from Chauncey Brown, purporting to convey to them the whole title to the lands in question, entered into the immediate possession of said lands, and the whole thereof, and that ever since that time they and their grantees have been in the actual, open, visible, notorious, and exclusive possession of the same, and the whole thereof, and that such title remained undisputed until the commencement of this action, October 10, 1892. The defendant's title to so much of the strip of land in question as George W. Brown died seised of is directly traceable to the deed to Sanford and Bassett mentioned. Thus it appears that William Brown, Franklin Brown, Martha Langdon, and Lura Blake, severally, slept on their rights, and made no claim to any portion of the strip of land in question, for more than twenty-nine

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years. During that time neither William Brown nor Franklin Brown was under any disability. It is true that Mrs. Langdon and Mrs. Blake were married women at the time of Chauncey Brown's death, when such real estate descended to them and their right of action therefor first accrued; and hence the statute of limitations did not, by reason of their disability, commence to run against either of them under the statute then in force. R. S. 1858, ch. 138, sec. 13. Such disability of married women was entirely removed March 2, 1872, by ch. 29, Laws of 1872, and such has since that time continued to be the law. R. S. 1878, sec. 4218. The result is that the ten-years statute of limitation commenced running against Mrs. Langdon and Mrs. Blake, respectively, March 2, 1872, and against William Brown and Franklin Brown, respectively, September 26, 1863. R. S. 1878, sec. 4211. The action was not commenced until more than twenty years after the cause of action accrued in favor of the women, and more than twenty-nine years after the cause of action accrued in favor of the men. The fact that Chauncey Brown only had a life estate in the undivided one-half of the lands so conveyed by him to Sanford and Bassett did not prevent the statute running in their favor or in favor of the defendant as a grantee under them. *Wiesner v. Zaun*, 39 Wis. 188; *Westcott v. Miller*, 42 Wis. 463, 464; *Barrett v. Stradl*, 73 Wis. 385. Thus it appears that neither William Brown, nor Franklin Brown, nor Mrs. Langdon, nor Mrs. Blake, was seised or possessed of any portion of the strip of land in question at any time during the twenty years immediately before the commencement of this action, and hence the plaintiff is barred from maintaining the same. R. S. 1878, sec. 4207.

3. The court found that by the plat of the village of Baraboo, made November 1, 1847, George W. Brown dedicated to the public, as a public street, all that portion of the land specified in the complaint which lies north of the south line of Water street, designated thereon. As indicated in the

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statement made, that plat extended north to the town line. Adjoining that plat on the north, and in another town, there was at the time a plat of the village of Adams. Oak street, mentioned, ran north and south and was one of the streets so platted in the village of Adams. Vine street, as indicated on the plat of the village of Baraboo, was in the direct line with Oak street, as designated on the plat of the village of Adams. Between blocks 2 and 3 in the village plat of Baraboo, and extending from Water street north to Oak street, on the town line, a street is designated on the plat, and the same must be regarded as a part of Vine street. This explains why the land conveyed by George W. Brown to Pratt was bounded on the west by Vine street. On the plat of the village of Baraboo, Water street is designated as running east and west along the south side of blocks 1, 2, and 3. It is true that the south line of the western portion of that street is not designated on the plat, but the several lots in blocks 1, 2, and 3 front upon it, and three streets from the north are indicated as running into it, and two streets on the eastern end are designated as running into it from the south. Besides, it is stated on the plat, among other things, that "all full lots are 66 feet by 132,—all the streets 66 feet wide." The mere fact that the south line of the street, on the western end thereof, is not designated on the plat, does not, in our judgment, prevent the effectual dedication to the public of Water street as and for a public street. True, the statute required the plat to "particularly describe and set forth all the streets, . . . giving the names, widths, courses, boundaries, and extent of all such streets." Terr. Stats. of 1839, p. 159, § 1; R. S. 1849, ch. 41, sec. 1. But that was, in effect, done. *Ely v. Bates*, 5 Wis. 467; *Weisbrod v. C. & N. W. R. Co.* 21 Wis. 602. The plat made and recorded, as indicated, followed by public travel upon such streets for more than forty years, must be regarded as a sufficient dedication of the streets to the public

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for public use as such. *Buchanan v. Curtis*, 25 Wis. 99; *Pettibone v. Hamilton*, 40 Wis. 402; *Jarstadt v. Morgan*, 48 Wis. 245; *Donohoo v. Murray*, 62 Wis. 100.

We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

VERRINDER, Appellant, vs. WINTER, Respondent, and WINTER and others, Appellants.

December 14, 1897—January 11, 1898.

Wills: Construction: Contingent remainders: Provision for unborn child.

1. A will made *in extremis* bequeathed to the testator's wife "two thirds of my estate while she remains my widow (if not) one half to go to her heir, and the other third to my brother D." The testator had no living children, but knew that his wife was pregnant. *Held*, that the testator intended to give his wife two thirds of his entire estate if she remained his widow, but if she remarried one of said thirds was to go to her unborn child.
2. A devise or bequest of such a contingent remainder to the unborn child either constituted a provision, or showed that the testator intended to make no provision, for him, within the meaning of sec. 2286, R. S. 1878, providing, in substance, that such a child shall abide by the will in case provision is made for him or the will shows an intention to make no provision, but that in default of either the child shall inherit as though the ancestor died intestate.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This is an action for the partition of certain real estate in Dane county. All parties claim title under one Washington G. Winter, who owned the lands at the time of his death, July 20, 1852. Winter died without living issue; leaving, him surviving, his wife, *Margaret Winter*, who was then, to his knowledge, pregnant. A few hours before his

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death, and while *in extremis*, he made a will, which was hurriedly drawn by a farmer neighbor, which reads as follows (errors in spelling being corrected): "I Washington G. Winter of the town of Dane, this is my last will and testament, I hereby bequeath to my wife *Margaret Winter* two thirds of my estate while she remains my widow (if not) one half to go to her heir, and the other third to my brother David Winter. My widow to choose the administrator." The will was duly admitted to probate December 6, 1852. On the 8th of December, 1852, *Margaret Winter* was delivered of a son, Washington G. Winter, Jr., who grew to manhood, and married the defendant *Josephine*, and died intestate in December, 1892, without issue, leaving *Josephine* as his sole heir. The plaintiff, *Margaret*, married one Thomas Verrinder in the year 1860. David Winter, the brother named in the will, died intestate in August, 1885, and the defendants and appellants *James W. Winter* and others are his heirs.

Upon these facts the circuit court concluded that, "if the words her heir, used in said will, were intended by the testator to refer to the unborn child, they gave such child a contingent remainder, dependent upon the possible subsequent marriage of his mother, the plaintiff, and were not such a provision for such child as is contemplated by sec. 2286, R. S." "That, if such words referred to such child, they do not constitute such an intentional omission to provide for such child as is mentioned by sec. 2287, R. S." Thereupon judgment dismissing the complaint was rendered, and the plaintiff, *Margaret*, and the defendants *James W. Winter* and others appealed.

For the plaintiff there were briefs by *Morris & Riley*, attorneys, and *Charles M. Morris*, of counsel, and oral argument by *Charles M. Morris*. They contended, *inter alia*, that the will made a provision for the child, within the meaning of the statute (sec. 2286, R. S. 1878). *Dodge v. Stevens*,

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105 N. Y. 585; *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130; *Hawhe v. C. & W. I. R. Co.* 165 id. 561; *Minot, Petitioner*, 164 Mass. 38; *Leonard v. Enochs*, 92 Ky. 186. The word heir was specifically intended to designate the unborn child. If the reversionary interest was not a provision adequate to satisfy the statute, it is still sufficient to show that the child was in the testator's mind. All that is necessary to show is that the matter was in the mind of the testator and by him deliberately acted upon. *Prentiss v. Prentiss*, 11 Allen, 47; *Wild v. Brewer*, 2 Mass. 570; *Church v. Crocker*, 3 id. 17; *Peters v. Sider*, 126 id. 135; *Wilder v. Goss*, 14 id. 357, 359; *Beck v. Metz*, 25 Mo. 70; *Hockensmith v. Slusher*, 26 id. 237. Specific mention in the will completely destroys the application of every case the respondent can cite.

A. G. Zimmerman, for the defendant appellants, except infants.

Sam. T. Swansen, guardian *ad litem*, for the infant appellants.

For the respondent there was a brief by *Spooner, Sanborn & Spooner*, and oral argument by *A. L. Sanborn* and *W. M. Spooner*. They contended, *inter alia*, that a contingent remainder is not such a provision for a child born after the making of the will as to bring the case within the statute. *Willard's Estate*, 68 Pa. St. 327; *Hollingsworth's Appeal*, 51 id. 518; *Ramsdill v. Wentworth*, 101 Mass. 125; *Bancroft v. Ives*, 3 Gray, 367; *Bowen v. Hoxie*, 137 Mass. 527; *Potter v. Brown*, 11 R. I. 232; *Rhodes v. Weldy*, 46 Ohio St. 234; *Holloman v. Copeland*, 10 Ga. 80; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Waterman v. Hawkins*, 63 Me. 156.

WINSLOW, J. The will, though hastily and inartificially drawn, is easily understood, and we think its construction is in no way uncertain. The testator was upon his deathbed, stricken with an acute disease. He was entirely conscious, and knew that his death was at hand. He had no

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living children, and knew that his wife was pregnant by him. The will was evidently intended to give his wife two thirds of his entire estate if she remained his widow; but, if she remarried, she was to retain but one of these thirds, and the other was to go to her unborn child. The remaining third was to go to his brother, David Winter. We think there is no reasonable doubt but that the words "her heir," in the will, referred to the unborn child, as certainly as though the words "her unborn child" had been used, instead of "her heir." In fact, it was admitted by the respondent upon the argument of the case that the testator evidently referred to the unborn child when he used the words in the will. This fact being determined, the questions in the case are simply as to the effect of the provisions of sec. 2286, R. S. 1878.

This section provides, in substance, that where a testator dies, leaving an unborn child, afterwards born alive, such child shall abide by the will, in case (1) the will makes provision for it, or (2) in case the will shows that the testator intended to make no provision for it, but that in default of either of these contingencies the child shall inherit as though the ancestor had died intestate. If, therefore, in the present case, the will makes provision for the unborn child, within the meaning of the statute, or shows the intention of the testator not to make such provision, then in either event the will must control.

We agree with the conclusion of the circuit judge that the remainder limited to the unborn child is a contingent remainder, dependent upon the possible subsequent marriage of the plaintiff. Whether a contingent remainder of this kind constitutes a "provision" for the child, within the meaning of the section quoted, is a question which we do not find it necessary to decide. The decisions in other jurisdictions upon somewhat similar statutes have been at variance upon the point. That it is not a "provision" is substan-

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tially held in *Rhodes v. Weldy*, 46 Ohio St. 234, where the cases supporting that view are cited. That it is a "provision" is held in *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130. But, as before stated, we do not find it necessary to decide the point in this case, because, as we view the case, the result in either event is the same.

It is clear that the testator referred to the child in his will, and gave it a contingent remainder in one third of his estate. It also seems clear that he intended to give the child just what the terms of the will give it. Now, if such a contingent remainder be a "provision" for the child, within the meaning of the statute, then the first contingency above named has happened, and the will must prevail; and if, on the other hand, such a remainder is not a "provision," then (the testator having intended to do just what the will declares) the will shows the intention of the testator not to make a "provision" for the child, within the meaning of the statute, and the will must likewise prevail. The word "provision" must have the same construction when it is used in two parts of the same section, and, giving it that construction, we see no logical escape from the conclusion above stated.

The widow, therefore, is entitled to one third of the real estate, the heir of Washington G. Winter, Jr., to one third, and the heirs of David Winter to one third.

By the Court.— Judgment reversed, and action remanded with directions to enter judgment of partition in accordance with this opinion.

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HUGHES, Respondent, vs. THE WISCONSIN ODD FELLOWS' MUTUAL LIFE INSURANCE COMPANY, Appellant.

December 15, 1897 — January 11, 1898.

Mutual life insurance: Power of directors to adopt by-laws: Change in by-laws modifying contract: Forfeiture: Waiver.

1. Where the act incorporating a mutual life insurance company (sec. 4, ch. 43, P. & L. Laws of 1869) conferred upon the board of directors power to enact, repeal, alter, or amend all by-laws, rules, and regulations for the management of the affairs of this company not inconsistent with the provisions of this charter, nor contrary to the constitution and laws of the United States, that body had power to pass a by-law providing that certificates of membership should be rendered absolutely void in case the insured came to his death by his own hand in any manner other than by accident.
2. Where a member of a mutual life insurance company stipulated in his application, which formed part of the contract of insurance, that he would "conform in all respects to the by-laws, rules, and regulations of this company now in force, *or which may be hereafter adopted* by the same or its board of directors," he and his beneficiaries are as effectually bound by an amendment to the by-laws, adopted by the board of directors after the policy took effect, avoiding it in case the insured committed suicide, as if such by-law had been in force at the time he became a member. *Morrison v. Wis. O. F. M. L. Ins. Co.* 59 Wis. 162, distinguished.
3. A mutual life insurance company did not waive its right to insist upon a forfeiture by accepting and retaining proofs of loss and paying two other policies, without objection, and arranging with the beneficiary, through its secretary, for her to attend meetings of the board of directors at which the matter of her claim was to be considered, notwithstanding she incurred some expense in attending such meetings.
4. The charter and by-laws of a mutual insurance company provided for assessments on members whenever, in the opinion of the secretary, the policy fund was insufficient to pay outstanding unpaid losses. Notice of an assessment to replenish such fund stated that the company had received notice and proof of death of plaintiff's insured and eleven others, specifying the amount for which each was insured. It was not shown how much, if any, of this assessment was collected, or that any specific part of it was paid,

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collected, or appropriated to pay the plaintiff's claim. *Held*, that such replenishing of the policy fund did not involve any admission of liability on account of plaintiff's claim, or any waiver of a forfeiture of the policy under which she claimed, by reason of the suicide of the insured.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This action was brought upon a contract of life insurance against the defendant, a corporation organized under ch. 43, P. & L. Laws of 1869, and acts amendatory thereof. It was organized to insure the lives of its members upon a mutual plan, similar to that generally adopted by so-called mutual benefit societies. Plaintiff's husband, B. B. Hughes, became a member of the company in 1876, and was insured in the sum of $1,000. He afterwards increased his insurance to the sum of $3,000 by separate contracts, the last $1,000 having been taken in 1881. In 1883 the plan of insurance was modified in some respects, and new certificates were issued in lieu of those previously held by members, including those held by Hughes, which new certificates were, however, based upon the former applications.

At the time of effecting the insurance for which this action was brought the plaintiff's husband signed and presented to the company an application in writing, dated June 11, 1881, in the form of questions and answers, one of which is as follows: "(14) Will you make punctual payment of all assessments for which you may become liable, and conform in all respects to the by-laws, rules, and regulations of this company now in force, or which may hereafter be adopted by the same or its board of directors? Yes." At that time there was no provision in the charter or by-laws of the company for forfeiting or avoiding its contracts in case of suicide by the insured; but in February, 1886, the board of directors of the company duly adopted the following by-law: "Every certificate of membership shall be and become wholly

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forfeited and utterly void and of no binding force and effect whatever upon the company, . . . if the insured shall die . . . by suicide, felonious or otherwise, sane or insane, or by his own hand, in any manner whatever, or under any circumstances other than by accident; . . . and no money shall be paid upon any certificate of membership thus forfeited." Section 4 of the charter, in force at the time of effecting the contract in suit, provides that "the directors are empowered to enact, repeal, alter, or amend all by-laws, rules, and regulations for the management of the affairs of this company not inconsistent with the provisions of this charter, or contrary to the constitution and laws of the United States or of this state." The original charter contained this provision, and it was retained therein and in the amended or revised charter.

The insured died by his own hand, December 7, 1894; all of the insurance held by him in the defendant company being then in force. The company paid $2,000 thereof, but refused to pay the $1,000 effected in 1881, for the recovery of which this action was brought. The contention of the company was that, under the provisions of its charter and the stipulations contained in the application for membership, it had the right to amend its by-laws so as to avoid certificates on account of suicide, and that the insured was bound by such by-laws, though enacted after he became a member. The trial court ruled that the company did not possess this power, and that members were not bound by by-laws enacted subsequently to their becoming members, and at the conclusion of the testimony directed a verdict for the plaintiff for the amount claimed, upon which judgment was rendered for the plaintiff, and from which the defendant appealed.

For the appellant there was a brief by *L. H. Mead* and *C. E. Estabrook*, attorneys, and *Quarles, Spence & Quarles*, of counsel, and oral argument by *George Lines*. They argued, among other things, that where, in any of the instru-

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ments forming the contract for insurance in a mutual benefit society, the insured agrees to be bound by laws passed after he becomes a member, such stipulation is as valid and binding as any other part of the contract. *Supreme Commandery Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Supreme Lodge K. of P. v. LaMalta*, 95 Tenn. 157, 30 L. R. A. 838; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203; *Stohr v. San Francisco M. F. Soc.* 82 Cal. 557; *Fugure v. Mut. Soc. of St. Joseph*, 46 Vt. 362; *Poultney v. Bachman*, 31 Hun, 49; *May v. N. Y. S. R. F. Soc.* 14 Daly, 394; Niblack, Ben. Soc. & Acc. Ins. § 26; 1 Biddle, Ins. § 54; *McCoy v. N. W. Mut. R. Asso.* 92 Wis. 577.

For the respondent there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford.* They contended, *inter alia*, that the forfeiture was waived as a matter of law by the appellant by calling for proofs and requiring the respondent to incur expense in connection with the claim, after it had full knowledge of the cause of death; and by collecting assessments to pay the loss. *Kidder v. Knights Templars & M. L. I. Co.* 94 Wis. 538; *Seibel v. N. W. Mut. R. Asso.* id. 253; *Pool v. Milwaukee M. Ins. Co.* 91 id. 530; *Erdmann v. Mut. Ins. Co. O. H. S.* 44 id. 376; *Cannon v. Home Ins. Co.* 53 id. 593; *Jerdee v. Cottage Grove F. Ins. Co.* 75 id. 345; *N. W. Mut. L. Ins. Co. v. Germania F. Ins. Co.* 40 id. 446. Appellant is conclusively estopped to deny liability after collecting assessments to pay the loss. *Hurd v. Doty*, 86 Wis. 1, 14; *Bullwinkel v. Guttenberg*, 17 id. 583; *Lafebre v. Board of Education of Superior*, 81 id. 660, 664; *Kiewert v. Rindskopf*, 46 id. 481; *Cairns v. O'Bleness*, 40 id. 469; *La Pointe v. Ashland*, 47 id. 251; *Casper v. State*, 47 id. 535; *Remington v. Ward*, 78 id. 539; *Heckman v. Swartz*, 50 id. 267; *Wells v. McGeoch*, 71 id. 196; *Gillmore v. Roberts*, 79 id. 450.

PINNEY, J. 1. The principal question presented by this appeal is whether the assured, Hughes, was bound by the

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by-law adopted by the board of directors of the defendant company in February, 1886, after the contract of insurance had been perfected, by which "every certificate of membership shall be and become wholly forfeited and utterly void, and of no binding force and effect whatever upon the company, . . . if the insured shall die . . . by suicide, felonious or otherwise, sane or insane, or by his or her own hand, in any manner whatever, or under any circumstances other than by accident; . . . and no money shall be paid upon any certificate of membership thus forfeited." It is contended that this by-law was void for want of authority on the part of the directors to adopt it, and that the assured never in any manner consented to this by-law. In 2 Cook, Stock, § 700*a*, it is said that: "By-laws are to be made by the stockholders in meeting assembled. . . . The directors have no inherent power to make by-laws. But the stockholders may delegate to the directors the power to make by-laws. Frequently the charter confers this power on the directors." 1 Beach, Priv. Corp. § 311; Angell & A. Corp. § 327.

The charter of the defendant corporation has always provided, in respect to the defendant company, ever since it was organized, that the directors are empowered to enact, repeal, alter, or amend all by-laws, rules, and regulations for the management of the affairs of this company not inconsistent with the provisions of this charter, nor contrary to the constitution and laws of the United States. Original charter (P. & L. Laws of 1869), ch. 43, sec. 4. Sec. 6 of the revised charter (ch. 1, Laws of 1887) provides that "the board of directors shall have power and authority . . . to enact, amend, alter, or repeal all by-laws, rules, and regulations for the management of the affairs of the company not inconsistent with the constitution or laws of the United States or of this state; and generally to manage and control the business and affairs of the company."

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But for this provision of the charter, the power to pass by-laws would doubtless be vested solely in the stockholders. But it is very clear, we think, that the power to pass by-laws was by the charter expressly delegated to and vested in the directors of the company, and we cannot doubt that it had power to pass the by-law in question.

The assured, in his application for membership, stipulated, in his answer to question 14 of his application, to "conform in all respects to the by-laws, rules, and regulations of the company now in force, *or which may be hereafter adopted* by the same *or its board of directors*." The provisions of the charter, and the by-laws and regulations adopted pursuant thereto by its board of directors, and the application of the assured for membership, together with his certificate of membership, all enter into and constitute parts of the contract of insurance. 1 Bacon, Ben. Soc. §§ 161, 181, and cases cited; Niblack, Ben. Soc. & Acc. Ins. (2d ed.), 136. The by-law in question rested on the power delegated by the charter to the directors to pass by-laws and regulations, and upon the stipulation of the member "to conform in all respects to the by-laws, rules, and regulations of the company then in force, or which might be thereafter adopted by the same or its board of directors." The subsequent by-law relied on by the company to defeat a recovery may be fairly said to have been consented to by the insured. He stipulated, in substance, to be bound by the action of the corporation at large, or of its board of directors, in respect to its by-laws, rules, and regulations. This was the effect of his contract, and, so far from being violative of the provisions of the contract, it is in accordance therewith, and with the consent of the assured contained in his application. He and his beneficiary stood in like condition as to the rights and interests represented by his membership in the company as a member of the civil state, having, as a condition of the benefits and advantages of membership, submitted to be

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bound as such member by the action of the proper legislative authority of the state or company. It being conceded that "the assured died by his own hand," the act by which he took his life executed at once the provision of the by-law in respect to his certificate of membership in the company, and rendered the certificate thereof *eo instante* absolutely void, without any other act, proceeding, or ceremony whatever. This was held, under like circumstances, in the case of *Schmidt v. Supreme Tent Knights of Maccabees*, 97 Wis. 528, in respect to the fact that the assured in that case had engaged in the sale of intoxicating liquors, which, by the terms of his membership, rendered his certificate absolutely void from and after the date of his so engaging in such prohibited occupation.

The conclusion at which we have arrived is that the death of the insured by his own hand at once rendered the contract of insurance void, both as to the member and his beneficiary, and is sustained by many well-considered cases. *Supreme Commandery K. G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Supreme Lodge K. P. v. LaMalta*, 95 Tenn. 157, 30 L. R. A. 838; *Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557; *Fugure v. Mutual Soc.* 46 Vt. 362, 370; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203. We think that the insured might and did contract with the defendant company to be bound and affected, in reference to by-laws and regulations of future enactment, as fully and effectually as if such laws and regulations were existing at the time he became a member, and might consent that they should enter into and form parts of the contract, modifying or varying the rights of the parties. We are unable to see that such laws and regulations can be considered as in violation of public policy. There is nothing in the case of *Morrison v. Wis. O. F. M. L. Ins. Co.* 59 Wis. 162, in conflict with the conclusion which we have reached. That case is clearly distinguishable, in that in that case there was no consent, either

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actual or constructive, on the part of the insured, to the change, either of the charter or by-law.

2. It is contended that the company had waived the forfeiture of the agreement of insurance by receiving proofs of loss in February, 1895, and retaining the same, and that it subsequently levied an assessment to pay the loss, collected the money, and paid over $2,000, the amount of the losses on the other two contracts. The evidence shows that the matter of the plaintiff's claim was turned over by the company to Mr. Mead, its president, for investigation, and he afterwards turned the same over to Mr. Hubbard, the agent of the company, for that purpose; and finally, as there was a question in regard to the claim, the secretary and other officers declined to do anything about it, unless the directors so ordered. Mr. Gallett, also a member, who was acting for the plaintiff, made an arrangement with the secretary by which the plaintiff might attend the meetings of the board of directors, as she did, at Prentice, at Milwaukee, and at Madison, for the consideration of this matter. Arrangements were also made for her to attend at Stevens Point, where the board was to meet, and she attended, but did not meet the board. It appeared that she had paid traveling expenses for herself and Mr. Gallett in attending these meetings. At the meeting of the board in June, 1895, it appeared "that the loss occasioned by the death of B. B. Hughes was discussed, and $2,000 ordered to be paid, and the balance of $1,000 [here in dispute] to be held subject to a decision by the supreme court in a case similar to this." It also appeared that June 6, 1896, at the meeting of the board in Milwaukee, the plaintiff appeared, and "on motion of Mr. Ryan further consideration of this claim was discussed." The substance of the entire matter appears to have been that the parties were considering and discussing the plaintiff's claim with the expectation of agreeing upon a mutual compromise or adjustment of it. The plaintiff was under

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no obligation or duty to meet the directors on these or other occasions. The fact that the parties did meet and attempt to adjust this claim, although the plaintiff expended money incidental to such meetings, constitutes no ground for saying that the defendant thereby waived its defense. Parties may meet face to face, and endeavor to compromise or adjust their controversies, without waiving their rights in respect thereto.

3. The record fails to show that any assessment was specially made, collected, or in any manner appropriated, for the payment of the loss or claim in dispute. By section 9 of the by-laws it was provided that: "Whenever it shall become necessary to make an assessment to replenish the policy fund as provided in section 11 of the charter, the secretary shall enter in a book, to be kept for that purpose, and known as the assessment book, an order substantially in the following form: The amount in the policy fund being insufficient, in the opinion of the secretary, to pay all outstanding unpaid losses, an assessment, to be known as Assessment No. —— of the year ——, is hereby made and levied upon all the members of the *Wisconsin Odd Fellows' Mutual Life Insurance Company* to replenish said fund. Dated, etc. ——, Secretary." Sec. 11 of the charter (ch. 1, Laws of 1887) provided that "whenever the amount in the policy fund hereafter provided for shall be insufficient in the opinion of the secretary to pay all outstanding unpaid losses, the secretary shall make an assessment upon the members of the company to replenish said fund, and shall notify the members thereof," etc. Sec. 13 provides that there shall be two funds, namely, the policy fund and the reserve fund. "All death losses and the excess of the company's expenses above the income of the reserve fund, if any, shall be paid from and out of the policy fund." The order of the secretary for an assessment to replenish the policy fund, dated March 1, 1895, was put in evidence, as follows:

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"The amount of the policy fund being insufficient, in the opinion of the secretary, to pay all outstanding losses, a double assessment, to be known as assessments number 145 and 146 for the year 1895, is hereby made and levied upon all of the members of the *Wisconsin Odd Fellows' Mutual Life Insurance Company* liable to pay assessments to replenish said fund.

"Milwaukee, Wis., March 1st, 1895.

"J. W. OSTRANDER, Secretary."

The notice given under said order stated as follows: "We have received notice and proof of death of the following named members since our last assessment: Mrs. M. Bowes, Beaver Dam, died October 2nd, 1894, insured for $1,000; B. B. Hughes, Prentice, died December 7th, 1894, insured for $3,000;" and specified also the death of ten other persons and the amounts for which they were insured. The amount of the policy fund of the company on hand on the 31st of March, 1897, was $1,600. The evidence wholly failed to show how much of the assessment thus ordered, if any, was collected, or that any specific part of it was paid, collected, or appropriated to pay the claim in dispute. If the policy fund was replenished by the assessment ordered, the money collected was the money and property of the defendant, which it had the right, as against the plaintiff, to hold, use, and appropriate as it might see fit. We cannot say that replenishing its policy fund by the assessment involves any admission of the plaintiff's claim, or of any liability on account of it, or waiver of the forfeiture upon which the defendant insists.

It follows from these views that the defendant established a complete defense to the action, and that the court erred in directing a verdict in favor of the plaintiff.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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HOOE and others, Appellants, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

December 15, 1897—January 11, 1898.

Railroads: Taking of land: Proceedings by remaindermen to recover compensation: Limitations: Election of remedies: Waiver.

1. A proceeding by remaindermen to recover compensation under sec. 1852, R. S. 1878, for the taking of land by a railroad company is an action for an injury to the inheritance within the meaning of sec. 2198, providing that remaindermen may maintain such an action notwithstanding any intervening estate for life or years. The running of the statute of limitations is, therefore, not suspended during the intervening estate.
2. Such a proceeding by remaindermen must be commenced within six years after the right of action accrues, or it will be barred under subd. 5, sec. 4222, R. S. 1878, limiting the time within which actions to recover for injuries to real property must be brought.
3. By commencing proceedings under sec. 1852, R. S. 1878, for the taking of land by a railroad company, remaindermen elected to take the compensation provided for therein, and thereby waived all remedies they otherwise might have had for the recovery of the land itself.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is a proceeding for the condemnation of certain lands for the right of way of the respondent's railroad, instituted by the appellants against the railroad company. The road has been built and in complete operation since June, 1856. The appellants are the heirs at law and devisees under the will of a former owner of the land. One Alexander S. Hooe was seised of the lands at the time of his death. He died in 1847, leaving a will, whereby he left all his estate to his widow, Emilie Hooe, during her lifetime, with remainder to their children. The will was admitted to probate. The appellants are the children of the testator and the said Emilie. In April, 1849, the widow conveyed the lands by war-

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ranty deed to one Abijah Fox. In September, 1853, Abijah Fox conveyed, also by warranty deed, to the Milwaukee & Mississippi Railroad Company, a strip of land across the same tract for right of way for its railroad, and a tract for depot grounds. The railway company entered at once upon the lands, claiming title thereto under its deed from Fox, and constructed its road and depot. The road was completed in 1856, and has been ever since in complete operation by the Milwaukee & Mississippi Railroad Company and its successors in title. The respondent now owns and operates the road. The widow died July 5, 1885. The petition which was the commencement of this proceeding was filed July 5, 1895. It asks for the appointment of commissioners to ascertain and appraise compensation to the appellants for the taking of the said lands for the right of way of its railroad and depot grounds. The respondent claimed title to the premises by adverse possession during the statutory period. The court adjudged the appellants to be without title to the lands, and dismissed the petition, with costs. The appeal is from the judgment dismissing the petition.

For the appellants there were briefs by *Bushnell, Rogers & Hall*, and oral argument by *A. R. Bushnell.* They contended, *inter alia*, that the right given to the land owner to commence proceedings under sec. 1852, R. S. 1878, is a mere privilege given him to perform a duty devolving upon the railroad company, if the latter neglects to perform it. This privilege is about the equivalent of the right to bring actions *quia timet*, to avoid anticipated or threatened injury, against which no statutes of limitation run. No statute of limitations can be held to have run against it, as long as without it the owner would have a right by ejectment to recover possession of the land. Sec. 1852 was never intended to set in operation any new statute of limitations. There was no present injury to the remaindermen until the falling in of the life estate. Their right is much in the nature of an inchoate right of dower, against which the statute of

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limitations would not begin to run in favor of the company until it became vested, because until then no right of possession had accrued. The statutes of limitation cannot properly be held to begin to run against anybody, until there is a present injury to his rights. The statutes applicable to real actions and rights in and to real property are applicable to actions under the condemnation statutes. *Tucker v. C., St. P., M. & O. R. Co.* 91 Wis. 576, 833.

For the respondent there was a brief by *H. H. Field* and *Geo. W. Bird*, attorneys, and *Burton Hanson*, of counsel, and oral argument by *Mr. Bird.*

NEWMAN, J. There is no dispute about the facts. The contention is over the proper application of the law to the undisputed facts. It is whether the appellants are barred from the maintenance of this proceeding for the condemnation of the lands for respondent's right of way, by any statute of limitations. The contention, in substance, is that because the appellants were mere remaindermen, having no right of action to recover the possession of the land from a person holding under the life tenant until after the termination of the life estate, they had no right to maintain this proceeding. So, consequently, the statutes of limitation would not begin to run against them until after the termination of the life estate; and this proceeding was begun within ten years after the death of the life tenant. So, it is claimed the appellants are not barred from this proceeding by any statute of limitation.

It is, no doubt, the law that the appellants could not have maintained an action for the recovery of the land itself during the lifetime of the life tenant, and that the statute which bars the recovery of the lands would not begin to run during the subsistence of the life estate. *Barrett v. Stradl*, 73 Wis. 385–395. But it is not perceived that these considerations are controlling of the contention; for this is not a proceeding which looks to a recovery of the possession

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of the land itself, but only to the recovery of damages for the taking of a part of it and the consequent injury to the whole tract. It was competent for the appellants to institute and maintain this proceeding at any time; at least, since the enactment of ch. 119, Laws of 1872 (R. S. 1878, sec. 1852). The fact that they were merely remaindermen did not disable them to bring an action for such an injury to their estate in the land. R. S. 1878, sec. 2198. But an action for such an injury must be brought within six years after the right of action accrues, and cannot be maintained afterwards. R. S. 1878, sec. 4222, subd. 5.

It is the settled law, since the enactment of ch. 119, Laws of 1872, that, where the owner of land has permitted a railway company to locate, construct, and operate its road thereon, he has thereby waived and lost all his former remedies for the recovery of the land or for injuries to it. But all such former remedies are merged in the proceeding for compensation, provided by the statute itself. *Frey v. D., S. S. & A. R. Co.* 91 Wis. 309. It may well be that the consent of the life tenant to the occupation of the land by the respondent with its railroad will not be binding upon the remainderman. So that the former remedies may remain to him, unless he, too, consents. But these appellants have made their election to take compensation. This, in effect, ratifies and consents to the occupation of the land by the respondent. This proceeding is virtually an action for compensation. If not in strictness an action for damages for an injury to the real property, it is the only legislative substitute for such an action, and the only remedy which remained to the appellants after they had waived a recovery of the land itself. This remedy was lost to them by their omission to assert their right in time. They are foreclosed by delay.

By the Court.—The judgment of the circuit court is affirmed.

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BEYER and another, Respondents, vs. THE TOWN OF CRANDON and others, Appellants.

December 15, 1897 — January 11, 1898.

Towns: Highways: Illegal contracts: Collusion: Restraining collection of judgment: Rights of taxpayers: Defect of parties: Demand upon officers to bring action, when unnecessary: Pleading: Equity: Fraud: Evidence.

1. A defect of parties plaintiff cannot be reached by a general demurrer to the complaint.
2. In an action by taxpayers of a town to restrain the collection of a judgment against the town on the ground that it was fraudulent and illegal, allegations of the complaint that the town officers, at the time of the commencement of the action, were in collusion with the owner of the alleged fraudulent claim to enforce its payment out of moneys raised by taxation and had caused a similar action instituted in its name to be discontinued, are *held* to state the existence of conditions rendering ineffectual, and therefore unnecessary, a demand upon the proper town officers to bring the action.
3. In order that a road may become a legal highway under sec. 1295, R. S. 1878, by reason of its having been laid out and recorded and worked for three years, there must be at least an order laying out the highway, made by the proper officers and filed in the office of the town clerk of the town in which it is situated.
4. A contract with a town for work upon a highway having no legal existence is illegal.
5. A contract with a town for work upon a highway, which expressly provided that the work should be paid for out of a tax to be levied the next year, after the term of office of the supervisors would have expired, there being no money in the treasury applicable to the work or taxes levied or about to be levied therefor, is illegal and void.
6. Where officers of a town contract in excess of their power, no liability against the town is thereby created, legal or equitable, from the mere fact that the other party to the contract has performed and the town has had the benefit of the work, the contractor being chargeable with knowledge that no authority existed for creating a debt against the town for work under the contract.

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Beyer and another vs. The Town of Crandon and others.

7. In an action to restrain the collection of a judgment against a town, founded on an illegal contract, evidence that the proper town officers knew the foundation of the claim when the suit to recover therefor was brought, and not only failed to defend but advised its being put into judgment, is *held* sufficient to establish collusion and fraud.

APPEAL from a judgment of the circuit court for Forest county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action by taxpayers of the county of Forest against the town of *Crandon*, in said county, and the town treasurer of such town, and the executors of the estate of R. B. Langdon, deceased, to enjoin the payment of a judgment against such town rendered in favor of Langdon in his lifetime, and owned by such executors as his personal representative. The ground upon which it was sought to enjoin the payment of the judgment was that it was fraudulent and illegal, and that the officers of the town permitted it to be entered with knowledge of the facts. The issues formed by the pleadings were tried by the court, which resulted in findings of fact and conclusions of law, in substance, that:

(1) Plaintiffs were taxpayers of the town of *Crandon* as alleged in the complaint;

(2) Proceedings were had to lay out a certain highway in the town, called the "North Road," but the law in that regard was not complied with;

(3) No tax was levied or money raised to be expended on said road;

(4) October 12, 1892, the town board let a contract to one Bailey for doing work on such road for the sum of $600, to be paid out of the tax levy of 1893;

(5) November 29, 1892, the contract was accepted and a bill allowed therefor in the sum of $570, but no claim was laid before the town board of audit of the town;

(6) After the allowance of the claim, Bailey assigned it to R. B. Langdon;

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(7) Judgment was rendered in favor of such assignee, with knowledge of the facts on the part of the chairman of the supervisors of the town and the town clerk, July 17, 1893, for $570 damages and $30.10 costs.

Upon these facts the court decided that the road was not legally laid out; that the contract was let without authority of law, and was illegal and void; that the judgment was collusive and fraudulent; and that judgment should be rendered according to the prayer of the complaint.

The facts found by the court, and the conclusions of law, were duly excepted to, and defendants appealed from the judgment.

For the appellants there was a brief by *A. W. Shelton* and *Paul Browne*, and a supplemental brief by *Samuel Shaw*, and oral argument by *Mr. Shelton* and *Mr. Shaw*.

For the respondents there was a brief by *George W. Latta*, attorney, and *John T. Fish*, of counsel, and oral argument by *Mr. Fish*.

MARSHALL, J. At the commencement of the trial defendants' counsel objected to any evidence under the complaint, which objection was overruled, and error is assigned on such ruling because the action was brought in the name of the plaintiffs alone instead of on behalf of all the taxpayers of the town; and further because there is no allegation in the complaint of a request of the defendant town to bring the action, and a refusal so to do.

It is a sufficient answer to the first ground stated, that if a defect of parties plaintiff exists — and none is perceived — such defect cannot be reached by a general demurrer to the complaint. That is elementary. *Nevil v. Clifford*, 55 Wis. 161.

It is a sufficient answer to the second ground urged in support of the objection that it is expressly alleged that the officers of the town, at the time of the commencement of

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the action, were in collusion with the owner of the alleged fraudulent claim to enforce its payment out of moneys collected from taxes levied on taxable property in the town. That shows, reasonably, that a demand upon the town officers to bring the action would have been ineffectual, hence such demand was not necessary as a condition precedent to the right of plaintiffs as taxpayers to proceed in their own names. Unquestionably, where the primary duty of bringing an action for the benefit of a corporation rests with the corporation, an allegation of a demand upon its proper officers to bring such action and their refusal so to do is essential to a cause of action in favor of a member of such corporation, unless the complaint shows the existence of conditions rendering such demand and refusal unnecessary. It has been repeatedly held that where the complaint charges that those in control of the affairs of the corporation are participants in promoting the wrong sought to be redressed, such condition is a sufficient justification for not making the demand, because of the obvious futility of it. *Doud v. W., P. & S. R. Co.* 65 Wis. 108; *Eschweiler v. Stowell*, 78 Wis. 316. So all that is required is that the complaint allege a demand upon the corporation to bring the action and a refusal to comply therewith, or state facts showing, to a reasonable certainty, that the corporation would not respond favorably to such a demand if made. It is considered that the allegations of the complaint in this case, showing that the officers of the defendant town had caused an action instituted in its name to be discontinued, and that they were acting in concert with the owner of the alleged fraudulent claim to secure its payment, sufficiently satisfies that rule.

The next contention made, which calls for consideration, is that the claim was a legal claim against the town, because the evidence shows that the road, under sec. 1295, R. S. 1878, was a legal highway by reason of its having been laid out and recorded and worked for three years, notwithstanding the

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law may not have been in all respects complied with; and that the refusal of a finding to that effect, requested by appellants, was error. It is essential to a legal highway, under such section, that it be recorded, that is, that there at least be an order made by the proper officers, laying out such highway, and that it be filed in the office of the clerk of the town in which the road is situated. Proof on that point, in the judgment of the trial court, failed, and we see no good reason for disturbing the decision in that regard. So the case stands with the finding of the trial court as a verity in the case, that the contract, which was the foundation of the alleged fraudulent claim, was for work on a highway not having any legal existence. It follows, necessarily, that the contract was illegal; and it was as clearly illegal for the further reason that there was no money in the treasury applicable to payment for the work, nor any tax levied, nor intended to be levied before the contract was made, or intended to be levied thereafter, during the term of office of the officers who let such contract. The contract expressly provided that the work should be paid for out of a tax to be levied the next year. Town officers have no authority whatever to contract debts to be paid out of taxes to be levied after their term of office expires, when no such taxes are authorized by law or have been voted by the electors of the town, and all such contracts are therefore illegal and void.

But it is said that the claim for the work done on the road is an equitable claim, because the town has the road. We see no good ground for sustaining that contention. The contractor knew, or ought to have known, that no authority existed for making the contract and creating a debt against the town for work under it. So he proceeded at his peril, and cannot be helped out on the ground of equitable estoppel, in that the town has the benefit of the road. If it be true that town officers can contract with a person for work for their town without any authority so to do, under such

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circumstances that such person is chargeable with knowledge of such want of authority, and he can yet perform the contract and then recover of the corporation upon the ground that it has received the benefit of his labor, a very easy road to the creation of indebtedness against towns exists, whereby taxpayers can be burdened with ruinous taxation without any adequate means of redress; but such is not the law. On the contrary, where officers contract in excess of their power, no liability against the corporation is thereby created, legal or equitable, from the mere fact that one party to the illegal contract has performed.

It is further said that there was no fraud or collusion shown in obtaining the judgment, therefore that the indebtedness has passed beyond the reach of taxpayers to question it in a suit in equity to restrain the collection of the judgment. Such contention can hardly be maintained in view of the undisputed evidence that the officers of the town knew the foundation of the claim when suit was brought to enforce it. They knew, or ought to have known, that it was not only an illegal but an inequitable claim. Therefore it was their duty to have defended against the claim, and their failure so to do was a fraud upon the taxpayers of the town, whom they represented. They not only neglected their duty to make a proper defense to the illegal claim, but they advised its being put into the form of a judgment. The evidence is conclusive that they colluded with the claimant to enforce payment of his claim in that way, as the only practicable way, under the circumstances, by which he could collect it. E. E. Cook, one of the town board, testified that he notified the owner of the claim that there was no money to pay it, and advised him to put it into the form of a judgment; that he knew it was for work on the alleged illegal road, and that the people were never favorable to it; that the board were in favor of the claim being put into judgment. This, and much other evidence

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in the case, amply sustains the finding of the trial court that the judgment was collusively obtained.

The case falls within the principles of *Nevil v. Clifford*, 55 Wis. 161. That case touches this at every point and unfavorably to appellants. The circumstances there were that officers of a school district, without authority of law, contracted for the erection of a school-house. There was performance of the contract on the part of the contractor. Thereafter such officers pretended to accept such building, and caused it to be occupied and used, but without authority from the taxpayers or electors of the district. Subsequently the contractor commenced an action to recover on the contract, and such officers permitted judgment to be taken against the district. Suit was then brought by taxpayers to enjoin collection of the judgment because illegal and inequitable. The court held on a demurrer *ore tenus* to the complaint, that it did not reach a defect of parties plaintiff, and further, that any taxpayer, or several taxpayers uniting, or one taxpayer on behalf of all, could bring an action to enjoin the payment of a fraudulent judgment; that the contract for the construction of the school-house, being in excess of the authority of the district officers, the claim of the contractor thereon was inequitable as well as illegal; that when the suit was brought on it, it was the duty of such officers, representing the district, to defend; that their neglect so to do, and permitting the suit to proceed to judgment, was a fraud upon the taxpayers of the district; and that any taxpayer could maintain an action to restrain its payment, on the general principle that equity will entertain jurisdiction of a bill on behalf of taxpayers to enjoin the misapplication of moneys of the corporation, and that one or more taxpayers may file a bill to restrain the allowance or payment of an illegal and inequitable claim, such as a judgment fraudulently and collusively obtained.

The foregoing leaves nothing further that need be said in

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this case. That under some circumstances a taxpayer may be estopped from challenging the validity of an illegal claim, as by inducing the creation of the debt by his own conduct, by requesting the making or performance of the contract, or by expressly or impliedly assenting thereto, is true, but no such, or any, circumstances appear in this case to estop the plaintiffs from maintaining this action.

By the Court.— The judgment of the circuit court is affirmed.

MORGAN and others, Appellants, vs. HAYES, Respondent.

December 15, 1897 — January 11, 1898.

Promissory notes: Action against indorser: Defense: Application of payments: Counterclaim.

1. In an action by indorsers of a note against a prior indorser (the payee), the complaint alleged that defendant was indebted to plaintiffs; that they had refused to accept the note as a payment on such indebtedness, but had aided him in procuring a purchaser for the note, and to that end had indorsed it for his sole accommodation and benefit; that the entire consideration was paid by the purchaser to him, and that he paid the amount so received to plaintiffs, who credited him therewith on his indebtedness to them; that plaintiffs had been compelled to pay the note; and that, after crediting defendant with a payment made by him on account of his liability as prior indorser and with the proceeds of mortgage security, a balance remained due. The answer substantially admitted the facts stated, but alleged that plaintiffs received the note as so much paid upon defendant's indebtedness to them; that he indorsed the note at their request and for their benefit; and that just before the foreclosure sale plaintiffs agreed to bid on the sale and protect and save him harmless from any liability on the note. The answer further alleged that before the commencement of the action the defendant fully paid, satisfied, and discharged any and all claims which the plaintiffs might have against him by reason of the transaction; but no counterclaim was pleaded, and there was no evidence of any payment

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except as stated. *Held*, that the defense was contrary to the very nature of the transaction, and wholly without merit.

2. In an action to recover a balance due for merchandise sold and delivered to the defendant, under an answer admitting the purchase and alleging payment, evidence that $500, paid to plaintiffs by defendant on account of another transaction before the merchandise was purchased, should be applied as payment on the merchandise, was inadmissible. The facts entitling defendant to such application should have been pleaded as a counterclaim.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Herbert L. Sweet, attorney, and *A. E. Thompson*, of counsel, for the appellants.

G. H. Dawson, for the respondent.

CASSODAY, C. J. The complaint alleges two causes of action: One based upon facts to the effect that June 23, 1893, the defendant, having a note and mortgage for $1,000, executed to him by one Finnegan, to become due November 28, 1893, subject to two prior mortgages for the aggregate amount of $11,000, and being at the time legally indebted to the plaintiffs, proposed to transfer the note and mortgage to the plaintiffs, and have the same credited upon his indebtedness to them; that the plaintiffs declined to accept of the same as payment, but offered to aid the defendant in making sale of the same, to which the defendant consented; that July 27, 1893, the plaintiffs having secured one Conant as a purchaser of the note and mortgage, and to effect such purchase, the defendant indorsed the note and assigned the mortgage, and the plaintiffs indorsed the same for the sole accommodation and benefit of the defendant, and at his request, and the same was thereupon transferred and delivered to Conant, who thereupon paid the consideration therefor wholly to the defendant, and that the defendant thereupon paid the plaintiffs the amount so received from Conant, and the same was credited upon the defendant's indebtedness to

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them; that October 13, 1893, the holder of the first mortgage commenced an action to foreclose the same, and judgment of foreclosure and sale was entered therein January 19, 1894; that when the Finnegan note became due the same was duly presented for payment, and payment thereof duly demanded and refused, and that said note was thereupon duly protested for nonpayment, and notice of protest thereof duly given to the defendant and to the plaintiffs; that December 8, 1894, the plaintiffs, upon demand made upon them by Conant, paid to him, as the lawful owner and holder of the note, the full amount thereof, with interest and protest fees, amounting to $1,148.74; that the note thereupon became and still is the sole property of the plaintiffs; that after paying the note, December 8, 1894, the plaintiffs duly notified the defendant that they should look to him for the amount of the note so paid by them, and should hold him responsible for the full amount of the same, and made demand therefor; that December 30, 1894, the defendant paid to the plaintiffs, to apply on his liability as prior indorser of the said note, the sum of $500; that the mortgaged premises were sold on such foreclosure judgment, March 11, 1895, and bid in by the plaintiffs for $11,700, and that such sale was thereupon confirmed; that after paying off the amount due on such two prior mortgages, and the expenses of such foreclosure and sale, there was a surplus of $398, which the plaintiffs indorsed as so much paid upon said Finnegan note.

The complaint contained another count for the same cause of action stated, and claimed, as a balance due the plaintiffs on account of the $1,148.74 paid by them as such second indorsers, less the $500 so paid December 30, 1894, and the $398 surplus on the sale, $274 and interest.

The answer substantially admits the facts stated, but alleges, in effect, that the plaintiffs received and accepted the Finnegan note and mortgage, June 23, 1893, as so much paid upon his indebtedness to them, and that he indorsed the

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note at the request and for the benefit of the plaintiffs; and that subsequently, and just before the sale on foreclosure, the plaintiffs agreed to bid on the sale, and protect and save the defendant harmless from any liability thereon; and further alleges that, prior to the commencement of this action, the defendant fully paid, satisfied, and discharged any and all claims which the plaintiffs might have against him by reason of the transaction stated. The answer contains no counterclaim, and there is no evidence of any payment on account of such transaction, except as stated.

It is enough to say that the defense to the cause of action stated is contrary to the very nature of the transaction, and wholly without merit.

The complaint alleges another cause of action, to the effect that between April 26 and May 16, 1895, at Oshkosh, the plaintiffs sold and delivered to the defendant, at his special instance and request, goods, wares, and merchandise of the value of $690.33, as per account attached; that the defendant then and there promised and agreed to pay the same to the plaintiffs, but that no part thereof has ever been paid, except $190.33, as per statement attached; that there is now due and owing to the plaintiffs from the defendant for such goods, wares, and merchandise the sum of $500; and the plaintiffs demanded judgment against the defendant upon the several causes of action set forth in the sum of $774, with interest, together with their costs and disbursements in this action.

The defendant's answer admits having purchased and received from the plaintiffs goods, wares, and merchandise to the amount and of the value of $690.33, as alleged, but alleges that prior to the commencement of this action the defendant duly paid, satisfied, and discharged the claim of the plaintiffs for said goods, wares, and merchandise *by payment.*

There is no evidence of any payment of $500 or any other

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sum on that account, except as stated in the complaint. The only pretense of any such payment is that the $500 which the defendant paid on the Finnegan note, December 30, 1894,—four months before the account in question was incurred—should be applied on this account. The defendant, as a witness in his own behalf, admits that he paid the $500 to the plaintiffs in December, 1894, on the Finnegan note; that after he had so paid the $500 on that note, and just befo e the foreclosure sale, he had admitted that he was liable for the remaining $500 and interest on that note; that he had requested the plaintiffs to pay back the said $500 by reason of his version of the transaction respecting the Finnegan note and mortgage mentioned. By such payment of the $500 in December, 1894, the defendant lost all further claim to it. But, even if it were otherwise, it was not set up by way of counterclaim, and the plaintiffs objected to any such evidence being admitted under the answer, and it was clearly not admissible. There is certainly no merit in any branch of the defense.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to render judment in favor of the plaintiffs, and against the defendant, as prayed in the complaint.

RAYMOND, Respondent, vs. KESEBERG and another, Appellants.

December 15, 1897 — January 11, 1898.

Appeal: Failure to bring action to trial after reversal: Waiver of right to dismissal: Special verdict: Appealable order.

1. The right of a defendant under sec. 3072*a*, S. & B. Ann. Stats., to have the complaint dismissed because the costs were not paid and the cause brought to trial within a year after the reversal of a judgment in plaintiff's favor, is *held* to have been waived, where

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plaintiff procured the record to be remitted within two months, and active negotiations for a settlement were soon commenced, which were continued until it was too late to put the cause upon the calendar of any term within the prescribed time, especially where defendant accepted the costs before the new trial began and retained them.

2. Failure to submit for special verdict questions proposed by the appellant is not error, where such questions are all covered, though in a different form, by the questions actually submitted, and such last-named questions are not objectionable.

3. Under ch. 212, Laws of 1895, an order denying a motion to dismiss an action under sec. 3072*a*, S. & B. Ann. Stats., because the costs were not paid and the cause brought to trial within one year after reversal of a judgment in plaintiff's favor, is not appealable.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.* An accompanying appeal from an order is *dismissed.*

On the evening of May 13, 1885, the plaintiff, while driving upon one of the public streets of the city of *Sheboygan*, ran over a mound of earth placed in the street by the defendant *Keseberg*, and was thereby thrown from his buggy and seriously injured. This action was brought to recover for such injuries. It has been tried several times, and has been before this court in one form or another four times. See 70 Wis. 318; 76 Wis. 335; 84 Wis. 302; 91 Wis. 191.

Since the last reversal another trial has been had, which resulted in the following special verdict: "First: Was the plaintiff injured on the night of the 13th of May, 1885, while riding in a buggy, by running into a mound of earth in front of the *Keseberg* property, in the city of *Sheboygan*, and being thrown out of the buggy thereby? Answer: Yes. Second question: Did such mound of earth render such street defective and dangerous for travel over the same? Answer: Yes. Third question: Had such defect or obstruction existed for such a length of time before the accident that the city of *Sheboygan*, by the exercise of ordinary care, ought to have known of same, and guarded the public against it?

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Answer: Yes. Fourth question: Did the defendant *Dorothea Keseberg*, at the time of the accident, exercise reasonable and proper care to warn persons traveling on said street of such obstruction? Answer: No. Fifth question: If you answer the fourth question 'No,' then was such failure to warn the public against such obstruction the proximate cause of the plaintiff's injury? Answer: Yes. Sixth question: Was the plaintiff, at the time of the accident, using ordinary care and prudence in traveling along and over said street in question? Answer: Yes. Seventh question: What amount of damages has the plaintiff sustained by reason of the injury? Answer: $5,000."

From judgment for the plaintiff upon this verdict the defendants have appealed.

For the appellants the cause was submitted on the brief of *Francis Williams* and *A. C. Prescott.*

For the respondent there was a brief by *J. E. McMullen* and *Barbers & Beglinger*, and oral argument by *Mr. McMullen.*

WINSLOW, J. It is a matter of sincere congratulation to all parties that the end of this protracted litigation has at last been reached. Careful examination of the record fails to disclose any reversible error. The points made by the appellants will be briefly noticed.

1. A motion was made in the circuit court, based upon sec. 3072*a*, S. & B. Ann. Stats., in November, 1896, to dismiss the action because the plaintiff had not brought the case to trial, and paid the costs upon the last reversal of the action (which took place October 22, 1895), within a year after such reversal. It appeared by the affidavits submitted upon the hearing of the motion that the defendants paid the fees of the clerk of this court, and that the record was remitted to the circuit court in December, 1895, and that active negotiations were soon commenced by the parties for

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settlement of the cause, and that by reason thereof the case was not put upon the spring calendar, 1896, and that such negotiations actively continued until the summer of 1896, when it was too late to put the cause upon the calendar of any term within the prescribed year, as there was no jury term to be held until November. Upon this showing the motion was denied, and the action was brought to trial in January, 1897, the plaintiff paying the costs upon reversal, and the defendants accepting the same on the 4th of January, 1897, before the jury was called. We think that under the rule stated by this court in *Whereatt v. Ellis*, 85 Wis. 340, the defendants waived the benefit of the provisions of sec. 3072*a*. If there were any doubt about this conclusion, it was certainly removed by the acceptance and retention of the costs before the trial began.

2. The defendants assign error because the court refused to submit certain proposed questions as a part of the special verdict. These questions were, in effect: (1) Whether there was a suitable lantern placed on the mound of earth; (2) whether the light from the street lamps was sufficient to make a lantern unnecessary; and (3) whether the plaintiff was so intoxicated as not to be able to exercise ordinary care. These questions were perhaps proper in themselves, but it will be readily seen that they were all covered, though in different form, by the questions of the verdict as actually submitted. So long as the material questions in the case are fully covered by the questions actually submitted, and such last-named questions are not objectionable, the statute is satisfied. The form of the questions is to be determined by the trial court, and, so long as they conform to the requirements of the statute and cover the material issues, there can be no error. We regard the verdict as sufficient in form.

3. It is contended that the evidence was insufficient to sustain the findings of the verdict. We have examined the

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bill of exceptions, and find it sufficient. It is unnecessary to state it at length.

The defendants are here with two appeals, one from the order denying the motion to dismiss under sec. 3072*a*, and another from the judgment in the action. The first appeal must be dismissed, because the order was not an appealable order under ch. 212, Laws of 1895. While it may be said to be an order "affecting a substantial right," it did not "determine the action" or "prevent judgment." It was, however, an intermediate order, reviewable upon appeal from the judgment, under sec. 3070, R. S. 1878, and for that reason we have considered the question in this opinion.

By the Court.— The appeal from the order denying the motion to dismiss is dismissed, with costs, and upon the other appeal the judgment is affirmed.

THE BANK OF KAUKAUNA, Respondent, vs. JOANNES and others, Appellants.

December 15, 1897—January 11, 1898.

Fraudulent conveyances: Chattel mortgages: Application of proceeds of sales to mortgagor's use.

The evidence in this case is *held* to show that the mortgagee of a stock of merchandise permitted the mortgagor to remain in possession of the mortgaged property under an implied or tacit agreement that the latter might use, sell, and dispose of the mortgaged property and apply the proceeds to his own use as if the mortgage had not been executed; that the situation of the parties and property was such that the mortgagee must have known the mortgagor to be dealing with the property in that manner; and that the mortgagee made no objection. The mortgage was therefore fraudulent and void as to attacking creditors.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

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The plaintiff brought this action against the defendants for the alleged wrongful taking and conversion of a stock of goods, the stock in trade of Jerry Strong, and which had been mortgaged by him to the plaintiff, August 24, 1888, for $500, with interest until paid at eight per cent. per annum, said stock being at the time in the possession of said Strong. It was averred that the mortgage was filed in the office of the city clerk of Kaukauna, where Strong resided, on the same day, and the plaintiff demanded judgment against the defendants in the sum of $600, with interest, etc. It contained the usual power of seizure and sale, and stipulated that, as long as the conditions of the mortgage were fulfilled, said Strong was to remain in peaceful possession of the property, and in consideration thereof was to keep the same in as good condition as it then was, at the cost and expense of the mortgagor. The defendants justified the seizure and alleged conversion under a writ of attachment in favor of the defendants as copartners under the name of Joannes Bros., for about $720, issued about the 5th of May, 1888, against said Jerry Strong, from the circuit court for Outagamie county, and it appeared from the said writ that the sheriff of said county levied upon and took into his custody and possession the property in question; that by virtue of an order entered in the action wherein the attachment was issued the sheriff sold portions of the property as perishable, and the remainder was sold on execution issued on the judgment recovered against said Strong.

Evidence was given tending to show that said Strong, upon and at all times from the date of said chattel mortgage to the time of levying said attachment, conducted a general grocery business in Kaukauna, and merchandised, sold, and disposed of the stock in question covered by the said chattel mortgage, conducting said business in the ordinary and due course of business, and by the consent of the plaintiff and its agent, and disposed of the proceeds thereof as he saw fit

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in support of his family, and paying expenses of the business, and in the same manner as though no mortgage thereon had been executed. The mortgage was put in evidence, as well as the writ of attachment and proceedings thereunder, and also the judgment roll in the case of Joannes Bros. and others against Strong, showing a recovery in their favor against Strong of a judgment of $843.33 and $91.20 costs.

The question litigated at the trial to which the testimony was principally directed was whether the chattel mortgage on the said stock was fraudulent and void as against the defendants and others of his creditors on the ground that the mortgagor carried on business in the store, and dealt with his stock, in the same manner, in all respects, after the mortgage was executed as before, and to the knowledge and with the consent of the plaintiff; that Strong did not account to the plaintiff for the proceeds of sales made from day to day, and it never asked or demanded that he should; that it knew that Strong had no means of paying the current expenses of the business and supporting his family other than from the stock, and knowingly permitted him to sell and dispose of the stock, and use the proceeds as he pleased in paying store and family expenses and debts other than the plaintiff's, pursuant to an implied or tacit understanding to that effect. The stock was sold under the execution and judgment.

The trial was before the court without a jury, the court finding that the allegations of the complaint were true; that the defendants wrongfully took possession of the goods and chattels described in the chattel mortgage, of the value of $800; that it was entitled to recover of the defendants the sum of $500, with interest at eight per cent. from February 24, 1888, amounting to $843.33, with costs, and judgment was given accordingly, from which the defendants appealed.

The defendants asked the court to find in support of their contention substantially as stated, and that the plaintiff permitted Strong to remain in possession of the mortgaged

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property, and continue his business, after its execution, until the attachment was levied, in precisely the same manner as he had done before the execution of the mortgage, using the proceeds to replenish the stock from time to time, and disposing of the balance of such property as he pleased, pursuant to an understanding or tacit agreement between Strong and the plaintiff to that effect; and that the chattel mortgage was fraudulent and void as against Strong's creditors, including the defendants. These findings were refused.

It appears from the evidence of Towsley, the plaintiff's cashier, that he made Strong the $500 loan February 24, 1888, and took the note and chattel mortgage, as agent for the plaintiff. May 5, 1888, Joannes Bros. and Weise & Hollman took the stock under an attachment, Sheriff *Golden* acting as officer in the matter, in Strong's store. During the time he was in business, from July 1, 1887, to about December 1st, he had seen Strong in the bank. He had no deposit there, but did have February 24th. His store was the next store to the bank, about twenty feet from the door of the bank. The stock was groceries, crockery, glassware, lamps, and fixtures. Before making the loan, he went into the store, and saw what he had there, and went again on May 3d. The stock looked the same as it did February 23d or 24th, as to quantity and quality. "I suppose he had been in possession of the stock from February 24th to May 5th. I knew he kept right on in his business just as before. I understood he was there continuing the business the same as before. I knew he was dealing there in business. I supposed he was paying expenses. To my knowledge, he continued dealing with this stock just the same after February 24th as he did before. Don't know that we had any understanding that he was to add to the stock he then had. I suppose he carried on his business just as he did before. He rented the store from Mr. Reuter, the president of the plaintiff bank. I paid no attention at all to the store after

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I took the chattel mortgage, no more than I did before. Went on, and let him do as he pleased. Did not pay any attention to it. Have no positive recollection of buying anything there between February 23d and May 3d, but my family bought, I think, in April, 1888."

Jerry Strong testified on the part of the defendants that he executed the mortgage at the request of Towsley, plaintiff's cashier, on the stock of goods, February 24, 1888, and was then indebted between $1,700 and $1,800. "I bought goods from seven or eight different parties, and was owing at least seven or eight different parties for merchandise when the mortgage was given. After the mortgage was executed, I continued the business with the stock of goods as I had done before. The business ran the same as ever. The giving of the mortgage made no difference in the management of the business, and it so continued up to the time I quit business. I had no property other than the stock of goods, fixtures, etc., in my business, aside from the household furniture and the horse and delivery rig, and no other income than that which I derived from my business and the stock of goods that had been mortgaged. With the proceeds of the business from day to day I paid my bills as fast as I could, and lived, of course. Paid bills right along that came due out of the proceeds of the stock that I received after the mortgage was given. I had a family at the time, and was keeping house. Part of the proceeds of the business was used in the support of my family. We derived our support from no other source than the proceeds of this business. Continued to pay creditors, support my family, and pay the expenses of the business as I had done before, and conducted my business in precisely the same manner as before the mortgage was given, and as though it had never been executed. No part of the proceeds of the business was ever paid on the mortgage. No portion of the mortgage has ever been paid. Was never asked by the bank or its officers, or by the cashier, to pay any part of the proceeds upon that liability. I

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purchased new goods as before,— approximately between $400 and $500 worth,— and they were put in with the others. I don't know whether Mr. Towsley was acquainted with my financial condition. He never asked any questions. I think he knew this business was my only source of income. He knew I was not doing anything else. I saw him every day, and quite often during the day I was in the bank and he in the store. We were close neighbors. From the proceeds of the business I bought drafts from the bank, subsequent to the mortgage, to pay bills; and I supposed he knew of it, he acting as cashier. I never deposited any money. Mr. Towsley used to be in the store every day, probably once or twice, and knew how I was managing the business. He never made any objection to my disposing of the proceeds as I pleased. He never said a word about it. He knew I was receiving money for the sales, and never made any demand on me for the sales, nor did he direct how to dispose of the money. When the mortgage was executed, neither he nor any other officials of the bank directed in any manner whatever how the proceeds should be disposed of. Q. Tacitly understood that you should go on with the business as before? A. I suppose so, there was nothing said. . . . Peter Reuter, the president, dealt with me after the mortgage was executed and before, and paid me the money on his bills after the execution of the mortgage the same as before. He was there in the store when I was making sales and receiving money, but did not direct how the proceeds should be disposed of. I suppose he knew, in a general way, about my financial affairs. He could see. That is about all. I rented a house, and kept house, and clothed my family; and all this came out of the business up to the time of the attachment."

There was other evidence tending to prove the facts relied on by the defendants.

In rebuttal Mr. Towsley testified that when the loan was made to Strong he knew nothing of his financial condition;

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that the loan was put to Strong's credit, and checked out by him in buying drafts; that he had no recollection of being in the store but once. Mr. Reuter, the president, also testified that he did not know anything about Strong's financial affairs on February 24, 1888, or between that date and May 3d; that he never owed him or paid him any bills; and during the time Strong was conducting his business he (witness) was out of town most of the time; that he could see goods there, and, so far as he knew, it was the same one time as another.

For the appellants there was a brief by *Greene, Vroman & Fairchild*, and oral argument by *C. E. Vroman.* They contended, *inter alia*, that the only inference to be drawn from the evidence was that there was a tacit or implied agreement that the mortgagor should deal with the goods and continue the business after the mortgage in the same manner as before, applying the proceeds to the payment of his personal expenses. The mortgage was therefore void as to creditors of the mortgagor. *Place v. Langworthy*, 13 Wis. 629; *Steinart v. Deuster*, 23 id. 136; *Anderson v. Patterson*, 64 id. 557; *Barnet v. Fergus*, 51 Ill. 352; *Rosenthal v. Vernon*, 79 Wis. 248; *Potts v. Hart*, 99 N. Y. 168; *Gangen v. Hachemeister*, 114 id. 566, 571; *Griswold v. Sheldon*, 4 id. 581, 588; *Southard v. Benner*, 72 id. 424, 429; *Wilson v. Voight*, 9 Colo. 614; *First Nat. Bank v. Wittich*, 33 Fla. 681; *Standard Imp. Co. v. Schultz*, 45 Kan. 52; *Brown v. Barber*, 47 id. 527; *Wile v. Butler*, 4 Colo. App. 154; *Putnam v. Osgood*, 51 N. H. 192, 208; *Huschle v. Morris*, 131 Ill. 587; *Simmons v. Jenkins*, 76 id. 479, 483; *Goodheart v. Johnson*, 88 id. 58, 61; *Smith v. Epley*, 55 Kan. 71; *Joseph M. Hayes Woolen Co. v. Gallagher*, 58 Minn. 502; *Tallon v. Ellison*, 3 Neb. 73; *Martin-Perrin M. Co. v. Perkins*, 63 Mo. App. 310; *Blakeslee v. Rossman*, 43 Wis. 116, 123; *Merchants' & M. S. Bank v. Loveland*, 84 id. 611.

G. H. Dawson, for the respondent.

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PINNEY, J. The conclusive inference from the facts testified to by the witnesses is that there was an implied or tacit agreement or understanding that the mortgagor was to be at liberty to use, sell, and dispose of the mortgaged property, and apply the proceeds to his own use, in like manner as before, and as if they had not been mortgaged to the bank. It is evident that the plaintiff knew, or had the ready means of knowledge, of the manner in which Strong was dealing with the mortgaged property. Strong's store and the stock of goods, which was not large, was next door, and within twenty feet of the entrance of the bank. No objection was made on the part of the plaintiff to his course of proceeding, and no effort was made to show that the property or its proceeds was applied to the payment of the mortgage debt. The evidence was very cogent and convincing that the mortgage was given with the understanding mentioned, and there was no fair or adequate explanation offered of the transaction consistent with the integrity and validity of the mortgage. As said in *Anderson v. Patterson*, 64 Wis. 559: "That the inevitable tendency and effect of a mortgage, fair and valid on its face, but void because of some extrinsic or secret infirmity, must be to hinder and delay the creditors of the mortgagor in the collection of their debts, is perfectly obvious, and the parties cannot be heard to say that they did not intend that such effect should result from their actions. . . . When property is mortgaged to one creditor to secure his demand, good faith to other creditors of the mortgagor requires that, if the same is sold, the proceeds shall be applied to the payment of the mortgage debt." The case of *Anderson v. Patterson*, *supra*, and cases there cited, are decisive. We must hold that the chattel mortgage relied on by the plaintiff is fraudulent and void, and the trial court should have given judgment for the defendants accordingly.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment in favor of the defendants.

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STITES, Guardian, Appellant, vs. THOMPSON and another, Respondents.

December 15, 1897 — January 11, 1898.

Pleading: Assumption of mortgage debt by grantees: Nature of liability.

1. A complaint alleging that, as part of the consideration paid for mortgaged premises, the defendants, in the deed conveying the premises to them, expressly assumed and agreed to pay a portion of the mortgage debt, is *held* sufficient to charge the defendants with personal liability. Whether the defendants knew of and assented to that provision in the deed is a mere matter of proof, and therefore need not be pleaded.
2. A purchaser of mortgaged premises, who assumes and agrees to pay the mortgage debt as part of the consideration, is liable as a principal and not as a surety; and his liability may be enforced without foreclosure of the mortgage. *Palmeter v. Carey*, 63 Wis. 426, limited and explained.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

The action is to recover the amount of one half of two promissory notes executed by one Henry O. Elsroad to the plaintiff, which were secured by a mortgage upon land. Elsroad sold a part of the lands which were subject to the mortgage to the defendants, who assumed and agreed to pay one half of the mortgage debt, as a part of the consideration to be paid by them for the land. The allegation of the complaint is that, "as part of the consideration and purchase price of said premises, . . . the said defendants *Thompson* and *Earhart*, in the deed conveying the said premises to them, expressly assumed and agreed to pay one half of . . . the said notes and mortgage." There is a demand for judgment for the amount of one half of the notes. There was a general demurrer, which was sustained, and the plaintiff appeals from a judgment dismissing the action with costs.

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The cause was submitted for the appellant on the brief of *Michael S. Bright*, and for the respondents on that of *T. L. McIntosh*.

NEWMAN, J. Two reasons are urged in support of the demurrer: (1) That the complaint fails to allege that the respondents knew that a clause whereby they assumed and agreed to pay the mortgage was contained in the conveyance of the lands to them, and that they assented to it; and (2) that the respondents are not liable on the promise alleged, as principal debtors, but as sureties, only, for such deficiency as may remain after the application of the mortgaged premises to the payment of the mortgage debt.

1. It is not the office of a complaint to allege merely evidential facts. Issuable facts only are to be alleged. The issuable fact which constitutes the appellant's cause of action is that the respondents assumed one half of the mortgage debt, as a part of the consideration to be paid by them for the mortgaged premises. It would be competent under such an allegation to show, in proof of the fact, either that the respondents had accepted a deed of the premises which contained a provision to that effect, or that they had promised orally to pay it. *Bishop v. Douglass*, 25 Wis. 696; Jones, Mortgages, § 752; *Morgan v. South Milwaukee Lake View Co.* 97 Wis. 275. It is enough to prove the substance of the issue. It does no injury, if, in some detail merely, there is variance. *McNally v. McAndrew*, *ante*, p. 62. The fact to be alleged and proved is the assumption of the mortgage debt. Whether the respondents knew of, and assented to, the provision in the deed, is a mere detail of the proof by which it shall be attempted to show that they assumed the mortgage debt. The allegation is sufficient as matter of pleading.

2. Whether the respondents are liable as principal debtors, or only as sureties, is not doubtful on well-established prin-

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ciples. It is well settled by a long line of decisions, in this state and elsewhere, that the person who engages with another, on a sufficient consideration, to do some act for the benefit of some third person, is liable to the latter in an action for a breach of that engagement. The rule is of general application. It applies equally to specialties and to simple-contract engagements; to written and to oral promises. *Bassett v. Hughes*, 43 Wis. 319; *Houghton v. Milburn*, 54 Wis. 554; *Grant v. Diebold S. & L. Co.* 77 Wis. 72; *Larson v. Cook*, 85 Wis. 564; *Enos v. Sanger*, 96 Wis. 150; *Morgan v. South Milwaukee Lake View Co.* 97 Wis. 275. The case where the grantee of mortgaged premises assumes the mortgage debt constitutes no exception to the rule. His liability rests on the rule, and is a logical consequence of the rule itself. *Enos v. Sanger, supra.* His liability is determined by the terms of his undertaking. If he takes the mortgaged premises simply subject to the mortgage debt, the premises are the primary fund for its payment. If he undertakes to pay the debt, he is liable for it as for his own debt. His undertaking in that case is absolute, to pay the whole debt, not limited to the payment of a contingent deficiency. He takes the place of the original debtor, and makes the debt his own. He is liable for it in the same manner and to the same extent as the original debtor was liable for it. His is the primary liability. As between himself and the original debtor, he becomes the primary debtor, and the original debtor becomes his surety. He, the same as the original debtor, is liable to a personal action for the recovery of the debt, without foreclosure of the mortgage. All this is the plain, logical consequence of the rule itself. Jones, Mortgages, §§ 758, 759, 762, and the cases cited; also, cases cited in notes, *Boone v. Clark* (Ill. Sup.), 5 L. R. A. 279; *Gifford v. Corrigan* (N. Y. App.), 6 L. R. A. 610; *Rice v. Sanders* (Mass.), 8 L. R. A. 315; *Jefferson v. Asch* (Minn.), 25 L. R. A. 275; *Hare v. Murphy* (Neb.), 29 L. R. A. 851; 3 Am. & Eng.

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Ency. of Law, cases cited in notes on page 866; 15 Am. & Eng. Ency. of Law, 832 *et seq.*, and cases cited. The respondents are liable in an action on their promise to pay the debt, the same as the original debtor would be.

Palmeter v. Carey, 63 Wis. 426, is cited as holding that the liability of the respondents is not primary, but as sureties, only, for a possible deficiency. And indeed some things are said in that opinion which seem to give countenance to that contention. But really no such question was involved or decided in that case. The question there related to the construction of sec. 3156, R. S. 1878. It was a question of practice, merely. It was whether, under that section, judgment for a deficiency in a foreclosure action could properly go against a purchaser of the mortgaged premises, who had assumed the payment of the mortgage debt as a part of the consideration of his purchase, or whether recovery against him must be by a separate action at law. It was not claimed, nor in issue, in that action, that the grantee of the mortgaged premises, who had assumed the mortgage debt, was liable otherwise than for a deficiency. That was all that the mortgagee claimed, and the grantee did not deny liability to that extent. He simply contested his liability to a judgment for a deficiency in the foreclosure action. His contention was that he could be made liable only in an action at law after the deficiency had been ascertained. The court deemed that the statute had been enacted to avoid the necessity of such circuity of action. The case did not call for a consideration of the question involved here. The court was not called upon to give careful or final consideration to a proposition which was neither affirmed by the respondent nor denied by the appellant. The decision is not in conflict with what is decided here. It is not authority beyond the point in issue and decided.

By the Court.— The judgment of the superior court of Douglas county is reversed, and the cause is remanded for further proceedings according to law.

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WALSH, Plaintiff in error and Respondent, vs. TIMLIN, Defendant in error and Appellant.

December 16, 1897 — January 11, 1898.

Justices' courts: Fees of garnishee.

Sec. 3781, R. S. 1878 (providing that "in actions against a garnishee, the person summoned to answer shall be entitled to receive the same fees for travel and attendance as a witness, and he shall not be bound to appear or answer unless his fees for travel and one day's attendance shall be first paid"), construed in connection with sec. 3778 (providing that "if any witness shall attend upon two or more cases in the same day before the same justice's court," he shall receive pay as in one case only), requires but one attendance fee and one traveling fee to be paid to a person to require him to appear and answer as a garnishee in several actions brought by the same plaintiff against him, returnable at the same time and place before the same justice.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

This was a garnishee action commenced in justice's court. Everything was done requisite to give the justice jurisdiction, unless there was a failure in that regard by reason of no traveling fees or fees for attendance having been paid to the garnishee defendant. There was another garnishee action commenced by the same plaintiff against the same garnishee defendant, returnable at the same place and hour before the same justice, in which all the requisites of the statute were complied with, necessary to confer jurisdiction so as to require the garnishee to appear and answer. The garnishee defendant appeared and answered in the action in which his fees had been paid, but refused to appear or answer in the other action. On its being made to appear that the fees were paid in one action, the justice proceeded to enter judgment in this action as in case of default. Thereafter such proceedings were duly had that the cause was re-

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moved to the superior court by writ of *certiorari*, and upon the hearing there had the judgment was reversed for want of jurisdiction to enter it, because of the failure to pay the garnishee defendant his fees for travel and attendance, as required by statute. Judgment was entered accordingly in the superior court in favor of the plaintiff in error, the garnishee defendant, *Walsh*, and against the defendant in error, the plaintiff, *Timlin*, for costs. From that judgment *Timlin* appealed to this court, having first obtained a certificate from the judge of the superior court, containing a statement of the facts and the other requisites necessary to such an appeal.

The questions of law stated, upon which the decision of this court is required, is whether the payment of fees to the garnishee defendant in this action was necessary to give the justice jurisdiction to require the garnishee defendant to appear and answer, or to proceed against him as in case of default for failure so to do.

The cause was submitted for the appellant on the briefs of *W. E. Hoehle* and *J. P. Geiser*.

For the respondent there was a brief by *W. M. Steele* and *A. T. Rock*, and oral argument by *Mr. Rock*.

MARSHALL, J. Sec. 3781, R. S. 1878, provides that "in actions against a garnishee, the person summoned to answer shall be entitled to receive the same fees for travel and attendance as a witness, and he shall not be bound to appear or answer unless his fees for travel and one day's attendance shall be first paid," etc. Sec. 3778, R. S. 1878, in regard to witnesses' fees in justice court, provides that, "if any witness shall attend upon two or more cases in the same day before the same justice's court," he shall receive pay as in one case only, to be apportioned between such cases. Sec. 4067, R. S. 1878, in regard to fees of witnesses in courts of record, provides substantially the same. Such sections must be construed together. Such, it is considered, was the mani-

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fest legislative intent. So construed, sec. 3781, R. S. 1878, requires but one attendance fee and one traveling fee to be paid to a person to require him to appear and answer as a garnishee in several cases brought by the same plaintiff against him, returnable at the same time and place before the same justice. That is in accordance with the decision of the justice in this case, which was reversed by the superior court.

It follows from the foregoing that the question certified by the trial court, on which the decision of this court is required, must be answered in favor of the appellant, and the judgment appealed from reversed.

By the Court.— So ordered; and the cause is remanded to the superior court of Douglas county with directions to affirm the judgment of the justice.

McCann and another, Respondents, vs. Doherty, Appellant.

December 16, 1897 — January 11, 1898.

Practice: Issue for jury: Stipulation: Logs and timber: Impeaching scale: Appeal.

1. In an action to recover a balance alleged to be due on a logging contract which provided for a scale to be made by a scaler to be agreed upon between the parties, a stipulation that the only question to be submitted to the jury should be as to the amount of logs put in under the contract eliminated from the case all other questions which would otherwise have been for the jury,— including the question whether the parties agreed upon a person whose scale was disputed as the scaler under the contract.
2. The evidence in such a case is *held* sufficient to sustain a finding of the jury that the quantity of logs banked under the contract exceeded the scale made at the time they were banked.
3. The objection that the finding of the jury as to the quantity of logs put in under the contract was in excess of the amount claimed in the complaint cannot be raised for the first time in this court.

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McCann and another vs. Doherty.

APPEAL from a judgment of the circuit court for Douglas county: R. D. MARSHALL, Circuit Judge. *Affirmed.*

October 6, 1892, the plaintiffs and the defendant entered into an agreement in writing wherein and whereby the plaintiffs agreed to cut, log, and bank, in a good and workmanlike manner, on the Brule river, all the pine on the lands described, and the defendant therein agreed to pay them therefor $3.75 per thousand feet, as follows: $3 when delivered on the bank of the river, and the balance June 1, 1893; the settlement to be made as per scale of logs to be made by a scaler agreed upon and paid by both parties equally. This action was commenced May 2, 1893, to recover $1,228.02, and interest from March 20, 1893, as the balance due on the first payment of $3 per thousand for 5,469,660 feet of the logs so delivered on the bank of the river. The answer admitted that 5,062,880 feet had been delivered, but denied that there had been any more delivered, and also pleaded a counterclaim.

June 24, 1893, the plaintiffs commenced a second action to recover the seventy-five cents per thousand feet, which, by the terms of the contract, became due June 1, 1893, amounting to $4,132.93. The pleadings in such second action are substantially the same as in the first, save that the balance claimed to be due by the plaintiffs was the amount stated, and to which the defendant made no claim of payment.

Such issues in the two actions having been joined, and such actions having been consolidated into one action by stipulation of the parties and the order of the court, and after hearing the evidence and the arguments of the attorneys for the respective parties, the parties agreed that the following question, and no other question, should be submitted to the jury, to wit: "What amount of logs did plaintiffs put in under the contract?" To that question the jury answered, "5,510,597 feet."

Thereupon the court found from the uncontradicted evi-

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dence: (1) That plaintiffs bark-marked, at defendant's request, at least 5,000,000 feet of logs, and that the reasonable value of the work of doing such bark-marking was $150, no part of which has been paid to the plaintiffs. (2) That at the commencement of the first action there was due to the defendant from the plaintiffs on account of the matters set up in the counterclaim in the answer in such first action the sum of $413.25; that prior to the commencement of the last action there had become due to the plaintiffs for putting in said logs the sum of $16,531.79, being the first payment under the logging contract which so became due March 20, 1893; and that the defendant paid on such amount before the commencement of this action the sum of $15,351.96. (3) That, after deducting the offsets from the amount due to plaintiffs as aforesaid, there remained due the plaintiffs at the time of the commencement of the first action $916.53, and interest thereon from March 20, 1893, at the rate of six per cent. per annum. (4) That after the commencement of the first action, and before the commencement of the second action, the sum of $4,132.93, and interest thereon from June 1, 1893, became due, as and for the last payment for putting in said logs, no part of which has been paid. (5) That the plaintiffs would be entitled to a lien upon the logs put in by them for the amount due them as aforesaid, as prayed for in the complaint, were it not for the fact that after the commencement of the action the defendant gave bonds and security in place of the lien,— it being intended that resort should be had to the bond, as security, instead of the logs.

As conclusions of law the court found that the work of bark-marking the logs was not included in the work of putting in the logs under the written contract mentioned, and that the plaintiffs are entitled to a credit of $150 for doing that work, which sum is allowed to them in above third finding. Accordingly the court ordered that judgment be entered in favor of the plaintiffs and against the defendant for

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$916.53, and interest thereon at six per cent. from March 20, 1893, as and for the amount due them over and above all setoffs, and recoverable in the first action mentioned, and for $4,132.95,and interest thereon at six per cent. from June 1, 1893, as and for the amount they are entitled to recover in the second action mentioned; and that judgment also be rendered in the plaintiffs' favor for their costs and disbursements, as the same may be taxed and allowed by the clerk.

From the judgment entered thereon accordingly, the defendant appeals.

For the appellant there was a brief by *Lamoreux, Shea & Wright*, and oral argument by *C. A. Lamoreux* and *W. F. Shea*.

For the respondents there were separate briefs by *O'Keefe & Copeman*, attorneys, and *Gleason & Sleight* and *Edgar Foster*, of counsel, and oral argument by *Richard Sleight*, *Mr. Foster*, and *M. S. Dudgeon*.

CASSODAY, C. J. It is undisputed that the plaintiffs commenced the work of cutting and banking the logs under the contract soon after it was made; that Gallagher commenced scaling the logs so cut and banked December 15, 1892, and continued such scaling until February 27, 1893; that during that time he had scaled, according to his count and measurement, 28,578 logs, containing 3,801,330 feet; that the balance of the logs cut and banked by the plaintiffs under the contract were scaled by Wallace Stevens, and they contained 1,261,550 feet,—making in all, with those scaled by Gallagher, according to Gallagher's scale, 5,062,880 feet, being the amount admitted in the answer. The plaintiffs allege in their complaint that Gallagher, either by mistake or with wilful intent to cheat and defraud the plaintiffs, erroneously scaled such logs, and rendered an account thereof below the true, honest, and just amount thereof, to the extent of eleven per cent. less than the actual and true scale.

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It is contended on the part of the plaintiffs that no scaler was agreed upon as prescribed in the contract, but that at the suggestion of the defendant the plaintiffs consented to allow Gallagher to scale on trial, with the understanding that either party was at liberty to object in case of dissatisfaction. After Gallagher had been scaling the logs for two or three weeks, the plaintiffs claim, they became suspicious, and so tested 130 or 140 logs, and compared the same with Gallagher's scale, and found them to be about fourteen per cent. short, and informed the defendant of the fact. A considerable negotiation in respect to getting another scaler followed, until February 21, 1893, when the plaintiffs secured the district scaler to make a test of the accuracy of the scale so made by Gallagher. The test was made by scaling 710 logs taken promiscuously from different rolls, and they were found to contain 21,720 feet more than represented by Gallagher's measurement.

It was contended by counsel on the argument that, even if such shortage existed as to the 710 so rescaled, yet it did not follow that there would be a corresponding shortage on the 27,868 logs which were not rescaled; and some of us were impressed with such argument. But upon careful consideration we are forced to the conclusion that the verdict does not rest wholly upon such test. On the contrary, there was a number of other tests, and there was evidence tending directly to impeach the good faith of Gallagher's scale. The evidence of such tests was admissible. In fact, no objection appears to have been made to its admission. After being banked, the logs passed into the possession of the defendant, so as to render complete remeasurement by the plaintiffs very difficult, if not impossible. By the agreement of the parties, the only question for the jury to determine was as to the amount of logs the plaintiffs put in under the contract. This eliminated from the case all other issues which would otherwise have been determined by the jury,—

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including the question whether the parties agreed upon Gallagher as the scaler under the contract.

The charge of the court is not in the record. We must assume, therefore, not only that it was without error, but that it covered every phase of the case and every fact which had any bearing upon the amount of logs the plaintiffs put in under the contract. In other words, the party alleging error has the burden of showing error. The court refused to set aside the verdict and substitute for the quantity of logs so found by the jury the quantity admitted in the defendant's answer. The court also refused to set aside the finding of the jury and grant a new trial. Upon the whole record, we cannot say that such ruling was an abuse of discretion, nor that the evidence is insufficient to support the finding of the jury. As the record stands, the plaintiffs are entitled to have the case regarded in the light most favorable for sustaining the finding of the jury.

It is true, such finding is for the amount of 40,937 feet in excess of what is alleged in the complaint; but it was not brought to the attention of the trial court, and no ruling was made upon it, and no exception is taken on that ground. Such an objection cannot be properly raised in this court for the first time.

The court properly held the defendant liable for the bark-marking.

By the Court.— The judgment of the circuit court is affirmed.

MARSHALL, J., took no part.

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FRENCH, Plaintiff in error, vs. THE STATE, Defendant in error.

December 16, 1897 — January 11, 1898.

Criminal law and practice: Drawing jurors: Error, when cured: Bill of exceptions.

1. In a criminal case, error in ordering the drawing of additional names from the supervisors' lists under ch. 126, Laws of 1895, when the regular panel was full, is *held* to have been cured, where, before the jury was completed, the court sustained the defendant's objection to the special jurymen so drawn, and discharged them, and directed the sheriff to summon additional jurymen from the body of the county as provided by sec. 2538, R. S. 1878, from whom, in addition to the regular panel, the jury was finally completed.
2. No question as to the regularity of the jury in a criminal case is available on writ of error, where no objection of any kind was made to it in the trial court.
3. The action of the trial court in a criminal case in permitting the testimony of a witness on a former trial to be read in evidence, in pursuance of an oral stipulation between the attorneys but against the objection of the defendant himself, cannot be reviewed on writ of error, unless such testimony is preserved in the bill of exceptions.

ERROR to review a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Willis V. Silverthorn, for the plaintiff in error.

For the defendant in error there was a brief by *Geo. H. McCloud*, district attorney, and *R. Sleight*, and a separate brief and oral argument by *John L. Erdall*, first assistant attorney general.

WINSLOW, J. The plaintiff in error was convicted of murder in the second degree at the September, 1896, term of the circuit court for Ashland county, and prosecutes his writ of error. Two former convictions have been reversed by this court. 85 Wis. 400; 93 Wis. 325. The facts of the homicide will be found fully stated in the opinion upon the second reversal, and no further statement is now necessary.

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A special plea of insanity was interposed and tried, resulting in a disagreement and discharge of the jury, whereupon the plaintiff in error was tried upon the plea of not guilty, and convicted. It is contended that the judgment should be reversed (1) for error in the drawing of the jury, and (2) for error in the admission of written evidence; both of said alleged errors having been committed upon the trial of the special plea of insanity.

1. It is well-nigh impossible to ascertain from the confused and fragmentary statements contained in the record just what the facts were in relation to the drawing of the jury, but it seems certain that it does not affirmatively show that there was error. As near as we can ascertain the facts, they seem to be as follows: There was a full panel of jurymen present, regularly drawn, when the case was called. The court, fearing that the number would be insufficient, ordered fifty names drawn from the lists furnished by the supervisors, under ch. 126, Laws of 1895, and directed a venire to issue for them. Meanwhile the drawing of the jury from the regular panel proceeded. Before the jury was completed, the court concluded that his former order was erroneous, and sustained defendant's objection to the special jurymen thus drawn from the lists, and discharged them, and directed the sheriff to summon twenty jurymen from the body of the county, under R. S. sec. 2538; and from these last-named jurymen, in addition to the regular panel, the jury was finally completed. If, in fact, the course of events was not as above indicated, certainly the fact is not shown by the bill of exceptions, or by the clerk's minutes; nor is it shown how many of his peremptory challenges had been used by the defendant, nor was there any challenge to the array, nor any objection of any kind made to the jury as finally constituted and sworn. The court was undoubtedly wrong in ordering the drawing of additional names from the supervisors' lists, under ch. 126, Laws of 1895, for the

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reason that the regular panel was full, and that chapter is only designed to cover the case of an entire absence of jurors upon the regular panel, or the case of a deficiency in numbers of the regular panel. But this error was corrected and the proper course adopted, under R. S. sec. 2538; therefore no prejudicial error appears to have been made. Moreover, the jury, as finally constituted and sworn, was not objected to in any manner. As to the jury on the second trial under the plea of not guilty, no objection of any kind was made, so that no question as to its regularity is before us.

2. At the commencement of the trial it was stipulated in open court by counsel, in the presence of the defendant and without objection from him, that when either party should be unable to procure the attendance of any witness who had testified on any former trial, the testimony of such witness might be read from the transcript of such former trial. Under this stipulation the trial proceeded, and the defendant introduced the testimony of several witnesses in his behalf by reading the same from the transcript of former trials. When, however, the state attempted to introduce the evidence of one Carr, a witness who was out of the state and whose attendance could not be procured, the defendant *in person* objected to it, saying: "I can impeach that by the testimony of Mr. Hencke, and for the further reason that the witness is not face to face with me,— no chance to impeach him. Mr. Hencke is perfectly willing to come in here and swear this man deliberately falsified himself while on the stand." The court overruled the objection, remarking that, "If you want to impeach the testimony, you can do so the same as if he were on the stand." To this ruling the defendant excepted in person. It is due to his counsel to state that he conceded that the testimony might be read under the stipulation, and that he took no exception. The testimony of Carr was then read, but it is not preserved in the bill of exceptions. This ruling is now alleged as error.

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The fact that the testimony is not preserved is a complete answer to the contention now made. We do not know what the witness testified to, and hence cannot say that the defendant was in any way prejudiced by the ruling. His testimony may have been immaterial, or it may have been beneficial to the defendant, but, in any event, it is sufficient that it does not appear that it was in the least degree injurious to the defendant's case.

By the Court.— Judgment affirmed.

LITTLE, Respondent, vs. STAPLES, imp., Appellant.

November 19, 1897 — February 8, 1898.

Pleading: Breach of contract: Several judgment against person sued as jointly liable: Variance between verdict and judgment: Immaterial error.

1. Allegations that defendants were copartners; that plaintiff had a running account with the firm; that he delivered to the firm a certificate for corporate stock, under an agreement that the dividends paid thereon should be collected and credited to him on such account; that several dividends were collected, the amount of each being specified; and that defendants thereafter refused to credit the same as agreed, or to account therefor, are *held* sufficient to state a cause of action for breach of the agreement.
2. Under sec. 2885, R. S. 1878 (providing that when it appears on the trial of an action against several defendants sought to be charged as jointly, or jointly and severally, liable, that some were liable and others not, judgment may be rendered against either or any of the defendants found liable), a judgment may be rendered against one of several defendants sued as copartners, notwithstanding the entire failure of proof as to a partnership liability.
3. An error in such case in rendering a verdict in form against all the defendants and entering judgment against one defendant in accordance with the undisputed facts, did not affect substantial rights, and is therefore disregarded, under sec. 2829, R. S. 1878.

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Little vs. Staples.

APPEAL from a judgment of the circuit court for St. Croix county: E. B. BUNDY, Circuit Judge. *Affirmed.*

Action to recover of the defendants as copartners, $913.31, alleged to have been collected by defendants for plaintiff as and for dividends on fifteen shares of corporation stock, together with the interest on such sum from the time so collected. None of the defendants were served or appeared in the action, except *Isaac Staples.* He answered denying the allegations of the complaint as to the partnership, also the allegations in respect to the agreement to collect dividends for plaintiff, and that dividends were collected and not paid or accounted for. At the close of plaintiff's evidence there was a motion for a nonsuit on the ground that there was no proof of the partnership. The motion was denied. At the close of the evidence it appeared that R. Hersey, named as defendant, was not a member of the firm of Hersey, Staples & Bean, but that there was such a firm, and that Samuel R. Hersey was a member thereof, instead of R. Hersey; that Samuel R. died; and that the partnership was dissolved before the commencement of the action. On motion the court allowed the complaint to be amended accordingly, and then directed a verdict in plaintiff's favor generally, for dividends which the evidence showed were collected on plaintiff's stock and not accounted for, with interest thereon. Judgment was thereafter rendered against *Isaac Staples* alone, from which this appeal was taken.

For the appellant there were briefs by *S. J. Bradford* and *Clapp & Macartney*, and oral argument by *N. H. Clapp.*

For the respondent there was a brief by *W. F. McNally* and *S. N. Hawkins*, and oral argument by *Mr. McNally.* To the point that the entry of judgment against the appellant was proper, they cited *Van Ness v. Corkins*, 12 Wis. 186; *Decker v. Trilling*, 24 id. 610; *Smith v. Cassell*, 70 id. 567; *Harrington v. Higham*, 15 Barb. 534; *Parker v. Jackson*, 16 id. 33; *Witherhead v. Allen*, 28 id. 662; *People v.*

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Cram, 8 How. Pr. 151; *Benson v. Paine*, 17 id. 407; *Brumskill v. James*, 11 N. Y. 294; *McIntosh v. Ensign*, 28 id. 169; *Stedeker v. Bernard*, 102 id. 327.

The following opinion was filed December 10, 1897:

MARSHALL, J. The complaint sufficiently alleges as facts, that in 1872 defendants were copartners under the firm name of Hersey, Staples & Bean; that plaintiff had a running account with such firm; that he delivered to the firm a certificate for fifteen shares of corporation stock, under an agreement that the dividends paid thereon should be collected and credited to the plaintiff on the books of the firm, in the running account between the parties; that several dividends were declared by the corporation and were collected on such stock (the amount of each such dividend being particularly set forth); and that defendants thereafter refused to credit the same as agreed upon, or to account therefor. Such facts were ample to sustain the action for damages for breach of the agreement. So the demurrer to the complaint, as not stating facts sufficient to constitute a cause of action, was properly overruled.

The evidence shows, without dispute, that plaintiff delivered the certificate of stock to defendant *Isaac Staples;* that he agreed to collect the dividends and credit the same to plaintiff; that dividends were paid on all the stock substantially as alleged in the complaint, aggregating in all about 175 per cent. of the face value of such stock; that *Staples* accounted therefor as to ten shares of stock, but refused to account for the collections on five shares, giving as an excuse that such shares had been conveyed to Hersey, Staples & Bean. On that state of the case the question is, Was it error to render judgment against defendant *Staples*, notwithstanding the entire failure of proof as to a partnership liability? The appellant relies upon the rule that governs in the absence of a statute, that where a suit is brought on

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a joint liability, the failure as to one defendant, in the absence of an amendment to the complaint to cure the defect, is fatal as to all. The answer to counsel's contention is, that sec. 2885, R. S. 1878, provides that, "when it shall appear on the trial of an action, on contract or tort, against several defendants, sought to be charged as jointly, *or jointly and severally, liable, that some were liable and others not, judgment may be rendered against either, or any, of the defendants found liable to the plaintiff at the commencement of the action.*" That covers the subject as plainly as language can do it, and must govern without regard to decisions of courts in jurisdictions where there is no statute.

The fact that the verdict was rendered in form against all defendants, and the judgment against *Staples* alone, is a variance that does not prejudice the appellant. The verdict should have been against *Staples* alone. The judgment was rendered in accordance with the undisputed facts. All errors not affecting substantial rights, under the statute on the subject, are disregarded, and no judgment reversed or affected by any such error. Sec. 2829, R. S. 1878. The full scope and meaning of such statute is often lost sight of by the profession, else many trifling defects that are proper subjects for amendment as of course in the trial court, and defects that do not in any way affect substantial rights, which are assigned for error and pressed upon the attention of this court with much earnestness and labor, would not be presented here at all. As said by DIXON, C. J., in *Decker v. Trilling*, 24 Wis. 610, it is a beneficent statute and cures a multitude of errors, as numerous cases in which it has been acted upon by this court will show. There a joint judgment on a several liability was held cured by the statute. In *Gorton v. Bailey*, 46 Wis. 633, a defective affidavit to a complaint upon which there was a judgment by confession, there being nothing to impeach the justice of the judgment; and in *Atkinson v. Harran*, 68 Wis. 405, a judgment for special

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damages in accordance with the evidence, though not claimed in the complaint originally or by amendment in the court below; and in *Forcy v. Leonard*, 63 Wis. 353, a judgment in accordance with the proof, not following the complaint as originally drawn, and without amendment curing the defect; and in *Jackson v. State*, 91 Wis. 253, a defective instruction that did not prejudice the defendant under the facts of the case, are a few of the many instances where the court has held the defects cured by the statute.

No other question is presented, deserving of special mention. The amounts collected as dividends upon the plaintiff's stock and not accounted for, as shown by the undisputed evidence, with legal interest up to the time of the trial, appears by computation to be substantially in accordance with the verdict.

By the Court.— The judgment of the circuit court is affirmed.

A motion for a rehearing was denied February 8, 1898.

LAGO, Respondent, vs. WALSH and others, Appellants.

January 11—February 8, 1898.

Master and servant: Personal injuries: Pleading: Negligence: Contributory negligence: Instructions: Evidence: Fellow-servants.

1. In an action for personal injuries received while stowing away sacks of bran in the hold of a vessel, the complaint — alleging in effect that at the time of the injury plaintiff was in the actual employment of defendant, in the performance of his duty at a place where it was necessary for him to be; that he notified his co-employees who were dumping the sacks into the hold to refrain from throwing down more sacks until he had piled up those already there; that it then became the duty of defendants and their

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employees not to throw down more sacks until notified so to do; and that the defendants, contrary to their duty and without warning, wrongfully and negligently ordered their dumpers to throw down several sacks into the hold, while the plaintiff, not knowing that sacks were to be thrown down without warning, was working directly beneath the hatchway, whereby plaintiff was injured — is *held* to be sufficient and not to show affirmatively that plaintiff was guilty of contributory negligence.

2. Evidence to the effect that there was a standing rule that dumpers should give warning to those in the hold before dumping down any sacks; that plaintiff had told the dumper not to throw down any more sacks; that one of the defendants passed by, and seeing trucks loaded with sacks standing there inquired the cause, and was told of plaintiff's direction; that such defendant then looked into the hold and said with an oath, "Dump them sacks, dump them down," and they were dumped accordingly, without warning, is *held* sufficient evidence to sustain a verdict finding negligence on the part of defendants.

3. The fact that the plaintiff heard the defendant's order to dump the sacks, and nevertheless continued working where they would be liable to strike him, is *held* not to render him guilty of contributory negligence as matter of law, in view of his previous direction to the dumper and the rule not to dump without warning, and of the equivocal language employed by the defendant.

4. An instruction that if the jury found the defendant intentionally ordered the dumper to dump instantly, without warning, when he had reason to think there might be men below in danger, such act constituted carelessness as a matter of law, and that plaintiff should recover unless they also found that he was guilty of contributory negligence, is *held* not to have been erroneous.

5. Nor was it error to instruct the jury that, in passing upon the question whether plaintiff would have escaped had he exercised ordinary care, they should take into consideration all the circumstances of the case,— "get into his shoes, so far as may be, when you pass upon his conduct;" and that carelessness meant "lack of ordinary care; that is, lack of such care as the man of ordinary care would exercise under the particular circumstances of the case," especially where followed by an instruction that defendant's order to dump acted as a revocation of the plaintiff's previous order to stop dumping, and imposed upon the plaintiff the duty of exercising reasonable diligence to get out of the way of the sacks so dumped; and that they should find for the defendants unless plaintiff exercised such reasonable diligence.

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Testimony of a physician to the effect that the plaintiff's injured leg was more apt to suffer in the future from rheumatism than if it had not been injured was admissible to show the actual effect of the injury.

7. An employer is not relieved from liability for negligence causing an injury to an employee by the fact that the negligence of a fellow-servant also contributed to the injury.

8. Under sec. 4197, R. S. 1878, where the complaint expressly alleged that the defendants were copartners, a general denial did not put in issue the question of partnership.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

A. T. Rock, for the appellants.

For the respondent the cause was submitted on the brief of *O'Brien & Vaughn.*

CASSODAY, C. J. This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff while in the employ of the defendants, assisting in loading a lake vessel with sacks of bran at the transfer dock of the Eastern Railway Company of Minnesota, at West Superior, between 9 and 10 o'clock on the evening of May 24, 1895. The cause being at issue and tried, the jury, at the close of the trial, returned a verdict in favor of the plaintiff, and assessed his damages at $168. From the judgment entered thereon the defendants bring this appeal.

There is evidence tending to prove that the contract of the company for the loading of the vessel was made in the name of the defendant *W. P. Walsh*, but that all the defendants who worked that day, known as the "ton gang," were to share the profits and losses of the business; that the boat at the time lay at the east side of the dock; that the method of loading the boat with the sacks or bags of bran, which would weigh 200 pounds each, was for the "truckers" to put two sacks on each truck at the warehouse or shed, and wheel them to the dock, and from thence to the hatchway

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or opening in the upper deck, of the usual size (eight by ten feet); that to conveniently and more safely lower the bags from the deck through the hatchway of the boat into the hold below, a sufficient quantity of such bags were first arranged into a pyramid or bulkhead directly beneath the hatchway, and extending from the bottom floor in the hold upwards to a point about two feet below the opening of the hatchway, directly above; that this pyramid was about three feet larger each way at the bottom, and about two feet smaller each way at the top, than the opening of the hatchway; that there were two men (Cone and Griffin) employed and stationed by the defendants on the deck of the boat, one at either side of the hatchway, whose sole duties were to dump from the trucks all bags brought to their respective sides, down upon the bulkhead, alternately forward and aft, and before so dumping to warn the men below, working in the hold, by crying out, just before dumping, "Below forward," or "Below aft," as the case required; that on the night in question the plaintiff and one Michigan were directed by the foreman of the defendants to work in the hold of the boat at the aft corner on the water side of such slide or bulkhead, and there to stow away such bags as came down to that corner; that pursuant to such directions they entered upon their duties; that they were unable to keep the bags stowed away as rapidly as they came down to them; that the plaintiff left the hold, and ascended the bulkhead, and told one of the dumpers (Cone) to dump no more bags into the hold until he told him to, that they were working right under the hatch, and were in danger there; that Cone said, "All right;" that, according to their custom in doing such work, the dumpers were thereupon required to refrain from further dumping until notified by the men in the hold; that the plaintiff and Michigan thereupon depended upon Cone not to dump any more sacks until they told him to; that very soon after, the defendant *McGovern*

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came on the deck of the boat, and said, "What is the matter with the trucks standing there?" that Cone replied that the men in the aft side had told him to hold the trucks; that *McGovern* looked down into the hold, and saw there was room for more sacks there, and then said to Cone: "Dump them sacks. Jesus Christ! dump them down;" that the plaintiff then went to grab another sack, thinking that Cone would not dump any more bags until he should tell him; that as he looked up the sack was coming, and that he just had time to save his head, and then the sack struck the bulkhead and the plaintiff's leg, and caused the injury complained of.

1. There is no good ground for holding the complaint insufficient, as contended. It alleges, in effect, that at the time of the injury the plaintiff was in the actual employment of the defendants, and in the performance of his duties at the place where it was necessary for him to be; that he notified the dumpers to refrain from throwing down more sacks until he had arranged and piled up those which had already been thrown down; that it then became the duty of the defendants and their other employees to so refrain from throwing down more sacks until warning should be given, in order to protect the plaintiff from injury; that the defendants, contrary to their duties and without warning, wrongfully and negligently ordered their dumpers to throw down several sacks into the hold while the plaintiff was working directly underneath the hatchway, and wholly ignorant that sacks were to be so thrown down without warning. The facts alleged in the complaint do not affirmatively show contributory negligence on the part of the plaintiff, as contended by counsel.

2. There was no error in holding that the evidence established the existence of a partnership between the several defendants, or at least that they were all engaged at the time in doing the work as principals. Besides, the complaint

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alleges, in effect, that the defendants were at the time co-partners engaged in loading and unloading vessels, and such allegation is not "expressly denied" by the answer, nor by any affidavit made by or in behalf of the defendants, or any of them, and hence "such averments" of the complaint must "be taken to be true." Sec. 4197, R. S. 1878; *Martin v. Am. Exp. Co.* 19 Wis. 336; *Fisk v. Tank*, 12 Wis. 276. The mere general denial in the answer did not put the question of partnership in issue.

3. We cannot hold, as a matter of law, that the evidence is insufficient to support a finding of negligence on the part of the defendants. One of the principal questions submitted to the jury was whether the sacks at the time in question were dumped down by order of the defendant *McGovern*, or by the foreman of the defendants, and the verdict, in effect, finds that it was done by the order of *McGovern*. This took the question of co-employee out of the case. It appears that there was a standing rule that the dumpers should give warning to those in the hold of the vessel where the plaintiff at the time in question was at work, before dumping down any sack. The question submitted to the jury was whether the language used by *McGovern*, and quoted above, was properly understood as an order to dump instantly and without giving warning, or only to dump after giving the usual warning, and the jury found that it was the former. We think the evidence sustains the finding of the defendants' negligence.

4. True, it appears that the plaintiff, as well as the dumper, heard the order of *McGovern;* but the fact that the dumper had been requested by the plaintiff not to dump until informed that the sacks had been cleared away below, nor without warning, and had promised not to do so, together with the equivocal language employed by *McGovern*, would seem to justify the court in not taking from the jury the

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question of the plaintiff's contributory negligence. True, the plaintiff could look up through the hatchway, but it was necessarily an awkward thing to do, down in the hold of the vessel, while moving and placing sacks weighing 200 pounds each; and, besides, it was between 9 and 10 o'clock at night. The verdict, to the effect that the plaintiff was free from contributory negligence, is sustained by the evidence.

5. Error is assigned because the court charged the jury: "If, however, you find that the order of *McGovern* meant dump at once, and he had reason to think there might be men at work below, in danger, I charge you that it was, as matter of law, carelessness, and your verdict will be for the plaintiff, unless you further find that plaintiff was himself careless in the premises, and that such carelessness on his part contributed to cause the accident. The burden is upon the plaintiff to prove by a preponderance of evidence that the order of *McGovern* meant dump instanter." Upon the conceded fact that the dumper, in pursuance of the order so given, did dump the sacks instantly and without warning, we find no error in this portion of the charge. If *McGovern* intentionally ordered the dumper to dump instantly while the plaintiff was thus exposed to danger, then it was not only careless, as a matter of law, but reckless.

6. Error is assigned because the court, in charging the jury, said: "Had he exercised ordinary care, would he have escaped the injury? In passing upon this important question, you will take carefully into consideration all the circumstances of this case,—get into his shoes, so far as may be, *when you pass upon his conduct.* Carelessness, as used in these instructions, means lack of ordinary care; that is, lack of such care as the man of ordinary care would exercise under the particular circumstances of the case." True, the jury were thereby instructed to get into the plaintiff's shoes, as far as might be, *when passing upon his conduct;*

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but we do not understand the instruction as fixing the plaintiff's conduct or his conception of duty as the standard of the care. On the contrary, the question under consideration was the exercise "of ordinary care," which was defined as "such care as the man of ordinary care would exercise under the particular circumstances of the case." We find no error in this instruction. Especially is this so since it was followed by an instruction, given at the request of the defendants, to the effect that *McGovern's* order to the dumper, so given and heard by the plaintiff, operated as a revocation of the plaintiff's previous order to stop dumping, and that "the duty was thereby imposed upon the plaintiff to exercise reasonable diligence to get out of the way of the sacks so dumped; and unless you further find that plaintiff did exercise such reasonable care and diligence as an ordinary, careful, prudent, and intelligent man would exercise under the circumstances, then your verdict should be for the defendant."

7. Nor do we think it was error for the court to give to the jury, at the request of the plaintiff, the following instruction: "If the jury should find from the evidence that the defendant *McGovern* ordered Cone, the dumper, to dump the sack of bran down into the hatch, and such order, under the circumstances, was negligence contributing approximately to cause plaintiff's injury, the fact, if you so find, that the negligence of Cone combined with such negligence of the defendant *McGovern* to produce the injury would not relieve the defendants from liability in this case." There are exceptions to other portions of the charge, but they are either too general or too inconsequential to call for consideration.

8. There was no error in admitting testimony of a physician to the effect that the plaintiff's injured leg was more apt to suffer in the future from rheumatism than though it had not been injured, as it tended to show the actual effect of

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the injury. Besides, the amount of damages allowed shows that the jury were not misled by such testimony.

We find no reversible error in the record.

By the Court.— The judgment of the superior court of Douglas county is affirmed.

ROOSEVELT, Respondent, vs. ULMER and others, Appellants.

January 11 — February 8, 1898.

Practice: Verification by agent: Service by publication: Sufficiency of order: Jurisdiction.

1. In an action to recover instalments of rent, the verification of the complaint by an agent showed that the deponent had acted as agent for the plaintiff in collecting rents for several years, and had collected a considerable amount thereof, and that his belief as to the allegations made upon information and belief was founded upon transactions wherein he was plaintiff's agent. *Held*, that this sufficiently set forth the agent's knowledge and the grounds of his belief, under sec. 2666, R. S. 1878.
2. The provision of sec. 2640, R. S. 1878, that the facts required to exist in order to authorize service by publication must appear in the complaint and affidavit for publication taken together, is a jurisdictional requirement and must be strictly complied with.
3. The provisions of sec. 2640, R. S. 1878, that the order for publication "shall direct that the service of the summons be made by its publication in a newspaper . . . not less than once a week for six weeks, and that on or before the day of the first publication" a copy be deposited in the post office, etc.; and that "the first publication must be made within three months from the date of such order," are not sufficiently complied with by an order requiring the first publication be made "three months *from* the date" thereof, and that "on or about the date of the first publication" the summons be mailed.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

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This was an action to recover instalments due upon the lease of certain real estate in the city of Superior, which lease was made by one Lewis to the defendants' firm in April, 1892, the rentals having been assigned by Lewis to the plaintiff herein in June, 1893. The complaint was verified by Mr. Gilbert, the plaintiff's agent and attorney, the plaintiff himself being a nonresident. The defendants were also nonresidents, and an affidavit for publication was made and filed, together with the complaint, upon which the order of publication was made, and thereafter personal service of the summons was made upon the defendants *Ulmer* and *O'Meis*. At the time of the commencement of the action, an affidavit for writ of attachment was also made and filed, and a writ issued, and certain personal property of the defendants attached. Judgment was thereafter rendered by default against all the defendants for the amount claimed in the complaint, and shortly afterwards the defendants *Ulmer* and *O'Meis* appeared specially and moved to set aside the judgment and attachment proceedings for want of jurisdiction. This motion was denied, and the defendants appeal.

For the appellants the cause was submitted on the brief of *Titus & McIntosh*.

For the respondent there were briefs by *Henry W. Gilbert* and *H. C. Sloan*, and oral argument by *Mr. Sloan*.

WINSLOW, J. The defendants were nonresidents, and personal service was made upon them outside the state, under an order of publication, and the question is whether jurisdiction was obtained. It is claimed that jurisdiction was not obtained because (1) the complaint was not properly verified; (2) it did not appear by the affidavit or the complaint that the defendants had property within this state, nor that the cause of action arose therein; (3) the order of publication required the first publication of the summons to be made *three months from* the date of the order, and that

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the summons be mailed "on or about" the day of the first publication.

1. The statute (R. S. 1878, sec. 2666) requires that, when a pleading is verified by an agent, he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reasons why it is not made by the party. It is objected in the present case that the verification does not set forth the agent's knowledge or his grounds of belief. The action is to recover instalments of rent upon a lease. The verification shows that the deponent had acted as agent for the plaintiff in collecting the rents for several years, and collected a considerable amount of the rents due from the defendants. These facts would almost necessarily place the agent in possession of the material facts with regard to the lease and its terms and the payments made. The principal allegations of the complaint are made upon knowledge, and we think that these statements sufficiently show the agent's knowledge. As to the allegations made upon information and belief, the affidavit states, in effect, that the grounds of his belief are founded upon and derived from such transactions wherein he was the plaintiff's agent. This seems to us quite a satisfactory showing, and we regard it as sufficient.

2. The facts required to exist in order to authorize service by publication must appear in the complaint and the affidavit of publication taken together. R. S. 1878, sec. 2640. This is plainly a jurisdictional requirement, and must be strictly complied with. *Anderson v. Coburn*, 27 Wis. 558; *Barber v. Morris*, 37 Minn. 194; *Cummings v. Tabor*, 61 Wis. 185. In the present case it was not alleged in the complaint nor in the affidavit for publication either that the defendants had property within this state or that the cause of action arose therein. R. S. 1878, sec. 2639, subd. 1. One of these facts must appear in order to justify an order of publication under subd. 1; and it is not claimed that a case was made under any of the other subdivisions. The conclu-

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sion necessarily follows that no order of publication could be made, and that, if made, no jurisdiction was acquired by service under it.

3. The order was also defective and void because it did not comply with the statute in vital particulars. The statute says (sec. 2640, R. S. 1878): "The order shall direct that service of the summons be made by its publication in a newspaper, . . . not less than once a week for six weeks, and that, on or before the day of the first publication," a copy be deposited in the post office, etc.; also, "the first publication must be made within three months from the date of such order." By some strange inadvertence, the order in the present case required that the first publication be made "three months *from* the date of the order," and that, "on or *about* the date of the first publication," the summons be mailed. This is certainly too wide a departure from the plain requirements of the law to be sustained in a jurisdictional proceeding where strict compliance is necessary. The terms of the order might be literally complied with, and the terms of the statute violated.

By the Court.— Order reversed, and action remanded with directions to vacate the judgment and set aside the attachment and all subsequent proceedings.

McLEAN, Appellant, vs. HOEHLE and others, Respondents.

January 12 — February 8, 1898.

Foreclosure of mortgages: Redemption by subsequent mortgagee.

Secs. 3533, 3534, 3540, R. S. 1878, provide that the owner of lands sold on the foreclosure of a mortgage by advertisement may redeem therefrom, and that if redemption be not made the sale shall be completed by the making of a deed to the purchaser, his assigns or personal representatives, and also provide that if the owner

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fails to redeem, any subsequent mortgagee may do so and will thereby become entitled to a deed completing such sale. *Held*, that the *bona fide* holder of a mortgage, though given after the foreclosure sale, who redeems therefrom, is entitled to a deed to complete the sale, which deed will vest in the grantee all the title of the mortgagor at the time of the making of the first mortgage, and cut off all further claim under such first mortgage.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The complaint alleges, among other things, that May 16, 1892, Mack C. Mehan mortgaged two parcels of real estate owned by him to plaintiff to secure the payment of $3,000 May 6, 1895, with interest payable semi-annually at a rate stated, according to six promissory notes and coupons attached thereto; that default was made in the payment of one set of the interest coupons, whereupon the mortgage was foreclosed by advertisement under the power contained therein and the statutes in such case made and provided; that at the foreclosure sale one of the lots was sold to plaintiff for $150 and the other for $144.96; and that certificates of sale were duly made, delivered, and filed. The complaint further alleged that *Jennie E. Mehan*, wife of the mortgagor, without consideration and with intent to defraud plaintiff, conspiring with her son, *Edgar C. Mehan*, to defraud plaintiff, obtained the legal title to the mortgaged property and placed a second mortgage on each lot, running to her said son, to secure the payment of $25; that thereafter said *Edgar C. Mehan*, in order to exercise his right as subsequent mortgagee to redeem from the foreclosure sale, paid to the proper officer the amount called for by the certificates of sale, whereupon such officer executed and delivered to him certificates of redemption, and thereafter, at the proper time, such officer executed to said *Edgar C. Mehan* sheriff's deeds, which were duly recorded, and under which said *Mehan* thereafter claimed to own the mortgaged prop-

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erty free from any claim of plaintiff under his mortgage or the certificates of sale issued on the foreclosure thereof; that the plaintiff failed to receive the redemption money paid as aforesaid, and demanded that the sheriff, in accordance with the terms of the certificates of sale, make deeds to him, which was refused. The prayer of the complaint was, in substance, that the certificates of redemption and the deed issued to *Edgar C. Mehan* be canceled, and that the officer who made the sale be required to make a deed to plaintiff, pursuant to the certificates of sale.

The court found the facts as alleged in the complaint, except as to the allegation of fraud. On that subject the finding was to the effect that the second mortgages were made to secure *bona fide* indebtedness, and that all the proceedings in regard to obtaining the title by *Jennie E. Mehan*, the making of such mortgages, and the redemption by the second mortgagee, were in good faith and free from fraud. The conclusions of law were that the title of *Edgar C. Mehan*, under his sheriff's deeds, was perfect and free from any claim of plaintiff under his mortgage or certificates of sale. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Francis H. De Groat* and *James P. McLean*, and oral argument by *Mr. McLean*. They contended, *inter alia*, that *Edgar C. Mehan* did not pay the sum necessary to be subrogated to the rights of plaintiff, the general equitable rule being that the whole amount of the mortgage debt is the amount to be paid by the subsequent incumbrancer in order to entitle him to whatever rights are possessed by the prior mortgagee. Upon another hypothesis, and making no objection to the execution of the deed to the junior mortgagee, he does not by such deed escape the incumbrance on the property. *Cox v. Wheeler*, 7 Paige, 248, 257, 258; *Tice v. Annin*, 2 Johns. Ch.

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125; *Benedict v. Gilman*, 4 Paige, 58; *Bradley v. Snyder*, 14 Ill. 263; *Collins v. Riggs*, 14 Wall. 491.

For the respondents the cause was submitted on the brief of *H. V. Gard* and *McCausland & Smith.*

MARSHALL, J. The sole question raised on this appeal is, Did the payment by *Edgar C. Mehan* as subsequent mortgagee, to the sheriff who made the foreclosure sale, of the amount called for by the certificate of sale on such foreclosure, entitle him to a deed to complete such sale, conveying to him all the right, title, and interest which the makers of the first mortgage had at the time of the execution thereof, thereby extinguishing all further claim under such first mortgage? That question must be answered in the affirmative on the plain, unmistakable meaning of the statutes governing the subject, as they existed when the proceedings in question were had. Sec. 3533, R. S. 1878, then provided that the mortgagor, whose lands were sold on the foreclosure of a mortgage by advertisement, might, within a time stated, redeem the same by paying to the purchaser, his executors, administrators, or assigns, or to the sheriff, under-sheriff, or deputy sheriff, who made the sale, the sum of money bid therefor, together with interest on such sum, as therein prescribed, whereupon the sale and certificate of sale should be void. Sec. 3534, R. S. 1878, provided that if redemption were not so made, the officer, or his successor in office, or other person who made the sale, or his executor or administrator, or some person appointed by the circuit court for the purpose, should complete such sale by executing a deed of the premises to the original purchaser, his assignee or personal representatives, or to any subsequent mortgagee who may have redeemed the same as provided in sec. 3540. The last-named section provided that any subsequent mortgagee might redeem the mortgaged premises

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the same in all respects as the mortgagor, in case of the latter's failure so to do. Defendant having exercised such right of redemption under sec. 3540, was entitled to a sheriff's deed under the first-mentioned section, by the express wording thereof. The right to the deed being given, and there being no provision to the contrary, it necessarily carried with it the same title to the subsequent mortgagee as if it were made to any one claiming under the certificate of sale, i. e., all right, title, and interest in the premises covered by the first mortgage. The deed effectually extinguished all further claim under such mortgage.

It is needless to discuss the subject of whether the foreclosure was of an indebtedness constituting a separate and distinct mortgage under sec. 3525, R. S. 1878, for if such were the case, there being no stipulation in the mortgage securing the instalments of indebtedness equally, the different instalments took precedence in the order they fell due; and a foreclosure under a prior instalment, completed by the execution and delivery of a deed, cut off all claims under subsequent instalments, the same as the foreclosure of any prior mortgage cuts off all claims under subsequent mortgages. *Pierce v. Shaw*, 51 Wis. 316.

No injustice is perceived because the statute leads to the result above indicated, as the first mortgagee had ample opportunity to protect himself by bidding the property, at the sale, up to a fair value; but if it were otherwise, the wisdom of the statute is not a matter for this court to determine.

By the Court.— The judgment of the circuit court is affirmed.

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McKENZIE, Respondent, vs. LEGO and another, Appellants.

January 12 — February 8, 1898.

Agency: Brokers: Sale of logs: Right to commission: Lumber inspectors: Evidence.

1. In an action against the vendors of logs to recover a commission for effecting the sale thereof, there was evidence tending to show, among other things, that February 20th the purchaser wrote the plaintiff inquiring for logs; that in February or early in March the defendants agreed to pay the plaintiff for finding a purchaser for the logs whatever the same should bring over and above a certain price; that March 5th the plaintiff informed said purchaser that defendants' logs could be had at the price subsequently paid for them, and recommended their purchase; and that the purchaser thereupon called upon the defendants and made the purchase. There was no evidence that the purchaser ever paid, or offered or promised to pay, to the plaintiff anything for securing such purchase. *Held*, that a finding that the plaintiff was the agent of the defendants, and not of the purchaser, was sustained by the evidence.
2. A provision in the contract for the purchase of the logs that the plaintiff should review and inspect the scale made by the defendants when the logs were banked, would not affect his right to recover commissions earned under the contract with the defendants, his services under the former contract being independent of those performed under the latter.
3. An agent employed to procure a purchaser for logs at a fixed price, without authority to make or close a contract for the sale thereof, becomes entitled to his commission when he produces a responsible purchaser ready and willing to purchase them at the price agreed upon.
4. The mere fact that a person was the lumber inspector in one district did not preclude him from making a contract by which he was to receive a commission for procuring a purchaser for logs situated miles away in another district.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

The facts are stated in the opinion.

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For the appellants there was a brief by *L. J. Rusk* and *Wickham & Farr*, and oral argument by *F. R. Farr* and *Mr. Rusk*. They contended, *inter alia*, that the policy of the law forbids that a person acting as the friend and confidential adviser of a purchaser should at the same time be secretly receiving a compensation from the seller for effecting the sale, and a contract for such compensation is void. *Bollman v. Loomis*, 41 Conn. 581; *Holcomb v. Weaver*, 136 Mass. 265; *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385, note; *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369; *Oscanyan v. Arms Co.* 103 U. S. 261; Greenhood, Public Policy, 292, Rule 261, and cases cited; Mechem, Agency, § 20.

For the respondent the cause was submitted on the brief of *Connor & Leonard*.

CASSODAY, C. J. This action was commenced in March, 1892, to recover an agreed commission and compensation for finding a purchaser of certain pine saw logs belonging to the defendants as copartners. Issue being joined, jury waived, and trial had, the court found, as matters of fact, in effect, that March 15, 1888, and for some time prior thereto, the defendants, as copartners, were the owners of 4,200,000 feet of saw logs, which they were desirous of selling; that in February, or early in March, 1888, the defendants promised and agreed to give or pay to the plaintiff, as commission for finding a purchaser for said logs, whatever the same should be sold for over and above $7 per thousand feet; that in pursuance of such agreement the plaintiff found and procured a purchaser for said logs in the person of one W. R. Anthony, and March 15, 1888, said Anthony purchased for the firm of W. R. Anthony & Co., of which he was a member, the said logs, at $7.25 per thousand feet; that in procuring such purchaser and making such sale the plaintiff was, and acted as, the agent of the defendants, and not as the agent of said Anthony or Anthony & Co. And

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as a conclusion of law the court found, in effect, that the defendants were indebted to the plaintiff in the sum of $1,050, with interest thereon from March 15, 1888; and judgment was entered thereon accordingly. From the judgment so entered the defendants bring this appeal.

It is undisputed that during the time mentioned the plaintiff lived near the Mississippi river, at Alma, in Buffalo county, and was engaged in the business of buying and selling logs and timber, and in negotiating the sale and purchase of logs and timber as a broker on commission; that during the same time the defendants were copartners, residing at Chippewa Falls, and owned the logs and the timber from which the logs were to be cut, all situate and being in Chippewa county; that previously the defendant *Grandmaitre* had assigned to the defendant *Lego* his interest in said timber and logs to secure him for moneys advanced in the enterprise; that one John King was a silent partner of the defendants in the business; that W. R. Anthony, mentioned, resided at Comanche, Clinton county, Iowa, and was a member of the firm of W. R. Anthony & Co.; that the plaintiff, by correspondence and otherwise, induced W. R. Anthony to go to Chippewa Falls, March 15, 1888, and while there to enter into a written contract in the name of his firm with the defendant *Lego* personally, wherein and whereby *Lego* agreed to cut, haul, and deliver to W. R. Anthony & Co., on Main creek, in Chippewa county, and some thirty or forty miles northeast of Chippewa Falls, the logs in question which had then been partly cut, and the balance were to be cut from timber on the lands therein described; that *Lego* therein further agreed to bark- and end-mark each log, as therein prescribed, and to have such mark recorded immediately in the lumber inspector's office at Chippewa Falls; that *Lego* therein further agreed to cause all such logs to be scaled as fast as banked, by a competent scaler, and upon the breaking up of logging operations to render to W. R. Anthony

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& Co. a statement in writing, certified to by such scaler, showing the whole number of logs, and the number of feet therein, the number of logs of each length, and the average number of logs per thousand feet, up to the date of such statement; that it was thereby mutually agreed and understood by the parties thereto that the scale of the logs made by such scaler should be reviewed and inspected by the plaintiff, who should have power to decide upon the accuracy of such scale, and in so doing might add to or deduct from such scale such amount as, in his judgment, should seem just, and his decision on such scale, when made, should be final, and binding on the parties, and constitute and be the scale of the logs upon which the payments therein mentioned should be made; that the title to the logs should vest in W. R. Anthony & Co. as fast as delivered in Main creek; that, in consideration thereof, W. R. Anthony & Co. therein agreed to pay said *Lego* $7.25 per thousand feet, as therein prescribed; and that the logs were, in fact, cut and delivered as so agreed. It is admitted in the case on the part of the defendants that such logs were sold to W. R. Anthony & Co. for $7.25 per thousand feet by *Lego* and not by the plaintiff.

1. Error is assigned because the court found that the plaintiff was not the agent of W. R. Anthony & Co. It appears that in November or December, 1887, one or more of the firm of W. R. Anthony & Co. was at Chippewa Falls, and learned about the logs, and had some talk with *Lego* about them; that it resulted in several letters passing between *Lego* and the firm, which finally terminated in that December or January following without reaching any agreement. February 20, 1888, Anthony & Co. wrote to plaintiff: "If you hear of any good logs for sale on bank, please examine them, if price is not too high, and report to us at once, so we can close deal if satisfactory." March 5, 1888, the plaintiff wrote to W. R. Anthony & Co.: "I think I can get

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King's logs for seven and a quarter. I think there is something in them for you. There will be about four million, and you must consider that they will get to the slough in good season next spring. They will be sold at that price if you do not want them. I have the refusal this week only. Answer by return mail." "King's logs," mentioned in the letter, meant the logs in question, as he was a silent partner of the defendants in respect to them; and the contract for the logs was executed ten days afterwards. It appears that subsequently to the sale of the logs, and prior to the trial of this action, the defendants and their silent partner, King, got into litigation; and the testimony of the defendant *Lego* is more or less in conflict with the testimony of the others, as well as the plaintiff. The defendant *Lego* flatly denies ever having made or authorized or consented to the making of any contract or agreement with the plaintiff for finding a purchaser of the logs; but upon the whole record we think the finding of the court to the effect that the defendants promised and agreed to pay to the plaintiff, as commission, for finding a purchaser for the logs, whatever the same should be sold for over and above $7 per thousand is sustained by the evidence, and that the plaintiff did find and procure such purchaser at $7.25 per thousand feet, and that in doing so the plaintiff acted as the agent of the defendants, and not as the agent of W. R. Anthony or Anthony & Co. There is no evidence that W. R. Anthony or Anthony & Co. ever paid, or offered or promised to pay, to the plaintiff anything to secure such purchase.

2. The question recurs whether the plaintiff is entitled to the commission of twenty-five cents per thousand feet upon the facts so found. The law is, undoubtedly, as claimed by counsel for the defendants, that "one who acts as the vendor's agent in the sale of property without the knowledge of the vendee, cannot recover from the vendee for services in effecting such sale as his agent; his concealment of the

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fact that he was agent for the vendor being a fraud in the law." *Meyer v. Hanchett*, 39 Wis. 419. The converse of the proposition is equally true, for it is well established that "one cannot act as agent for both seller and purchaser, unless both know of and assent to his undertaking such agency and receiving commissions from both." *Meyer v. Hanchett*, 43 Wis. 246. In the case at bar the plaintiff was not employed by the defendants to make a sale of the logs, but merely to find some one who was willing to purchase at $7 per thousand or upwards, leaving the parties to make their own contract.

Thus, in *Herman v. Martineau*, 1 Wis. 151, the defendant, who owned a farm, agreed to pay to the plaintiff $10 if he found him a tenant to whom he could let his farm, and another person, who desired to rent a farm, agreed to pay to the plaintiff $5 if he would find him a farm which he might rent. The plaintiff thereupon brought the would-be tenant and the owner of the farm together, and they thereupon consummated a contract for the letting of the farm; and it was held, in effect, that the plaintiff was not the agent of the former for letting the farm, and that the fact that the tenant had agreed to pay him for finding the farm to rent was no objection to his recovery of the $10 from the farmer for thus finding a tenant. This was put on the ground, as stated by the court, that: "There was no opportunity here for the violation of good faith on the part of Herman, and it was entirely consistent with his duty to Martineau that he could, at the same time and in the same transaction, perform a service, and thereby earn a compensation from a third party. The test in such cases is whether the interests of one of the parties for whom the person acts are antagonistic to those of the other party; for, if they be, he could not be said to act with a sole regard to the interests of his principal." *Id.* 157, 158. That case was expressly approved in *Stewart v. Mather*, 32 Wis. 355, and it is there stated by

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DIXON, C. J., to be "in strict harmony with the decisions," which he cites; and, among other things, he said: "Thus, in *Rupp v. Sampson*, 16 Gray, 398, it was held that if a middleman brings together a buyer and a seller, each of whom has agreed, without the knowledge of the other, to pay the middleman a commission on any contract which may be made between them, and a contract is made between them, in the making of which the middleman takes no part as agent for either, the conduct of the middleman in concealing from each his agreement with the other is not fraudulent, and is no defense to an action brought by him against either to recover the commission agreed upon." *Id.* 355. In that case this court held that, "where a sale is effected through the efforts of a broker, or through information derived from him, so that he may be said to have been the procuring cause, the law leans to that construction of his contract with the vendor which will secure the payment of his commission, rather than to the contrary construction." *Id.* 344.

So it was held by this court in a more recent case that "one who, in the sale or exchange of property, acts merely as a middleman to bring the parties together, they making their own contract, may recover compensation from both parties." *Orton v. Scofield*, 61 Wis. 382, and cases there cited. See, also, *Willes v. Smith*, 77 Wis. 81. In the still more recent case of *Donohue v. Padden*, 93 Wis. 20, it was held that "a real-estate broker is entitled to the agreed commission upon a sale of land where the owner fixed the price, received the full amount stipulated for in his contract with the broker, and was to receive no more in any event, although, before his employment, the broker had shown the land to the purchaser and the latter had expressed a desire to meet the owner, and although the broker had rendered some services to such purchaser."

The plaintiff was a middleman, and nothing more. There is no evidence that he had any authority to make or close

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a contract for the sale of logs on the part of the defendants, much less on the part of Anthony or Anthony & Co. His only engagement was to find and procure a purchaser, as he did. That engagement was fully performed when he procured W. R. Anthony to visit the defendants at Chippewa Falls, and express to the defendants a willingness to purchase the logs at the price named; especially as no objection was made to him for want of responsibility or otherwise. Both Anthony and his firm appear to have been wholly unobjectionable. When such purchaser was so procured, the plaintiff, under his agreement with the defendants, had fully earned his commissions, and was then entitled to his compensation. Such right to compensation could not then have been defeated, even had the defendants refused to close the contract. *Stewart v. Mather*, 32 Wis. 355; *Willes v. Smith*, 77 Wis. 81.

3. This being so, it is really immaterial as to what the plaintiff subsequently agreed to do in respect to the logs. The question here presented is not whether the plaintiff could have collected pay of Anthony or Anthony & Co. for reviewing and inspecting the scale made on the part of the defendants when the logs were banked, as "mutually agreed and understood" by the express terms of the contract, but whether he can recover for services upon an agreement fully performed at the time when the contract with Anthony & Co. was signed. His services for reviewing and inspecting the scale were independent of his former services, and for them he was to be paid, and was, in fact, paid. The answer is a mere general denial, and the character of the stipulation in that contract in regard to so reviewing and inspecting the scale when the logs were banked was not involved in the issue on trial nor the issue tried.

4. So the mere fact that the plaintiff was lumber inspector of the Ninth district, at Beef Slough, in Buffalo county, did not preclude him from entering into a contract to procure

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a purchaser of logs situated in Chippewa county, and in another district, and many miles away from Beef Slough.

By the Court.— The judgment of the circuit court is affirmed.

AMES, Respondent, vs. STORER, imp., Appellant.

January 12— February 8, 1898.

(1) *Appeal: Findings.* (2) *Mortgages: Foreclosure sale: Interest of mortgagee under tax certificates.*

1. Findings of the trial court will not be disturbed on appeal unless they are against the clear preponderance of the evidence.
2. Under sec. 3169, R. S. 1878 (providing that the sheriff or referee making a foreclosure sale "shall make, execute and deliver to the purchaser a deed of the premises sold . . . which deed, upon the confirmation of such sale, . . . shall be a bar to all claim, right or equity of redemption therein, of and against the parties to such action, their heirs," etc., and also against all persons claiming under them subsequent to the filing of the notice of *lis pendens*), a referee's deed to the purchaser, upon the confirmation of the sale, passed to him all the right, title, or interest of the mortgagee in and to the premises sold, including his interest in the premises arising under tax certificates held by him at the time of the sale.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The plaintiff brought this action, claiming to be the owner in fee simple and in actual possession of lots 19 and 20 in block 10 in West Superior, First division, Douglas county, Wisconsin (setting forth his title thereto), to quiet his title to said premises, as against the defendant *George L. Storer* and twelve others, in respect to certain tax certificates and tax claims asserted against said lots. The defendant *Storer*, only, answered the complaint, and he, only, appeals from the judgment rendered in the action.

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The premises were mortgaged to the defendant *Storer* by one Baribeau, the owner thereof, May 20, 1890; and the mortgage was foreclosed by action in the superior court of Douglas county, judgment of foreclosure having been rendered March 19, 1894, and the premises were sold under the same at referee's sale in May, 1895, to James B. Finch, who conveyed the same to the plaintiff in August, 1895. The premises had been sold at a tax sale in 1893 for taxes for $327.14, to one Humphrey, who about June 1, 1893, assigned the certificates of sale to the defendant *Storer*. The same premises, after judgment and before the foreclosure sale, were again sold for taxes for $391.81, to the defendant *Storer*, who paid in all for the four tax certificates thereon $718.95. The mortgagor had covenanted in the mortgage to pay all taxes. It appeared that the defendant *Storer* was never in possession of the mortgaged premises, either actually or constructively, and that his purchase of said tax certificates was for the express purpose and with the intention, only, of protecting his mortgage lien, and that he held them only to reimburse himself for the money he had paid for such certificates; that he was not seeking any tax deed on the premises; that he had paid the actual face value of said certificates, with all interest, costs, and charges thereon; and that at the time of the referee's sale under the said judgment he was the holder and owner of said certificates.

James B. Finch became the ostensible purchaser of the mortgaged premises at the referee's sale under the judgment, for the sum of $5,551.46; and the referee on the same day executed and delivered to him a deed of said premises, in the usual form of a referee's deed of sale on foreclosure. On the 31st of August, 1895, Finch conveyed the premises by quitclaim deed to the plaintiff. The premises were bid in for said Finch by E. F. McCausland, of the firm of McCausland & Smith, acting as the attorneys and agents of said purchaser, and who were duly authorized so to do. The

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sum total of said judgment and taxes at the date of the sale was $6,299.44, and the market value of the premises was $9,000. The purchaser had actual knowledge of the taxes outstanding against said premises at the time of the sale, and of the existence of said four tax certificates. The plaintiff, *Samuel Ames*, was the actual and real purchaser of said premises at the referee's sale, and they were bid off in the name of said Finch only as a matter of convenience. Up to the time of the confirmation of said referee's sale and deed of said premises, they were in the possession of the mortgagor, Baribeau, and the rents and profits were all paid either to him or to his use and benefit.

It was found that at the time of the commencement of the action the plaintiff was the owner in fee simple of the premises, and in the actual possession and occupancy of said lots, and that none of the defendants had any estate or interest in said premises, or any part thereof, of any kind or nature; that said tax certificates were purchased and acquired by the defendant *Storer* while he was the owner and holder of said mortgage and the judgment of foreclosure thereof, and that by the purchase and acquisition of said tax certificates he redeemed said mortgaged premises from said sales, and that such certificates became void; that, by the sale of said real estate to the said Finch pursuant to the foreclosure of said mortgage, the defendant *Storer* thereby transferred to said Finch all his interest in said real estate upon which said mortgage was a lien, free and clear from any and all liens and incumbrances in favor of him, the said *Storer*.

The court gave judgment in favor of the plaintiff and against the defendant, establishing the plaintiff's claim, right, title, estate, and possession in and to the premises, and that the said Finch, through whom the plaintiff claims title by his purchase of said real estate at the mortgage sale, acquired all the right, title, and interest of the said *Storer*, including

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his interest in all of said tax certificates, in and to the property in dispute; and gave judgment against the defendant *Storer* for costs, from which he appealed.

The defendant *Storer* by his answer insisted that it was agreed between him and the said purchaser, Finch, by and through his attorneys and agents, that he (Finch) was to bid off said premises at the sum of $5,551.46, which was the amount of said *Storer's* foreclosure judgment independent of said tax certificates; that, in case no higher sum should be bid by others, he (said Finch) was to bid in said premises at said amount, and reimburse the defendant *Storer* the amount paid by him for said four tax certificates, with accrued interest, costs, and charges, and that, unless said Finch was willing to carry out such agreement in all respects, the defendant *Storer* would bid in said property himself; that said Finch, his agents, etc., agreed, in consideration of said premises being so sold to him, and in the absence of any higher bid, that said taxes should be taken care of as above stated; that the defendant *Storer* relied on such agreement, and for that reason refrained from bidding off said premises, believing that said purchaser, Finch, would reimburse him for the moneys so paid out by him for the said tax certificates. The defendant *Storer* claimed to own and hold said tax certificates, and to be entitled to enforce the same against the said premises, as liens thereon, and the right, title, and interest acquired at such foreclosure sale and so subsequently conveyed to the plaintiff.

In support of the contention of the defendant *Storer*, Mr. Perkins, his attorney, testified in substance that he stated to Mr. McCausland, acting for the plaintiff in making the purchase, that it would take the amount of the judgment, $5,551.46, plus what defendant *Storer* had paid out for taxes, which was about $747, the amount of the four certificates in question, to purchase the premises; that all the defendant *Storer* wanted out of the premises was his money, the

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amount of the judgment and costs, and the taxes that he had paid out; that he did not want any tax deed, and said to him, "If you bid in this property for your client at the amount of our judgment, and costs and taxes, as stated, and there is no higher bidder, you can have the property, if you will reimburse us for those taxes;" that McCausland, on behalf of his client, promised to do that, and that he (Perkins), as attorney for *Storer*, relied on that agreement, and the sale was carried through, and the property sold to Finch on the strength thereof; that all this was said before the mortgage sale, and that he relied on these conversations in allowing the property to be bid in by Finch, and believed that the amount of the certificates would be paid to *Mr. Storer;* that McCausland had called for a statement of the amount of the taxes, and he (Perkins) had furnished the statement, or stated to him the amount.

On behalf of the plaintiff, and in rebuttal of the evidence produced on the part of the defendant, both McCausland and Peckham, who participated on behalf of the purchaser, Finch, in making such purchase, testified in substance that there never was any such conversation, or any understanding that the purchaser at the foreclosure sale would take care of or assume the payment of the taxes. McCausland testified positively that Perkins never said anything to him about the taxes on the property; that he did not say anything to him about his client, Finch, having to take care of those taxes; that nothing was said about taxes to him, that he ever heard of. The witness Peckham testified that Mr. Perkins said nothing to him about *Mr. Storer* having the tax certificates on the property, and did not know at that time that *Mr. Storer* had them; that Mr. Perkins never said anything to him about the outstanding taxes as a part of the purchase price of the property. Considerable testimony was given pro and con in relation to this contention. Mr. Perkins testified that Peckham gave him a draft when the

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matter was settled; that he did not ask him for the amount of the tax certificates, and did not know whether anything was said about it at that time; that he relied on McCausland's word to carry out the agreement in regard to the taxes, and supposed it would be carried out; that he gave him the amount it would take to clear up the judgment and taxes at $6,311.

The court refused to find according to the contention of the defendant *Storer* in relation to the taxes and tax certificates, but found in that respect in favor of the plaintiff. The defendant *Storer* excepted to the finding, and appealed from the judgment so given in favor of the plaintiff.

For the appellant there were briefs by *Phil. H. Perkins*, attorney, and *Burr W. Jones*, of counsel, and oral argument by *Mr. Jones*. They contended, *inter alia*, that a mortgagee who is not in possession is under no obligation to pay the taxes, nor does he hold a fiduciary character toward the mortgagor, and hence he is not disqualified from acquiring a tax title. The cases which hold otherwise under such circumstances are either in states where the common-law rule prevails as to the character of mortgages or are cases where the mortgagee was in actual possession of the premises. Black, Tax Titles, § 278; *Waterson v. Devoe*, 18 Kan. 223; *Spratt v. Price*, 18 Fla. 289; *Summers v. Kanawha*, 26 W. Va. 159; *Reimer v. Newel*, 47 Minn. 237. The turning point in all the adjudged cases is the obligation of the party setting up the tax title to pay the taxes. *Smith v. Lewis*, 20 Wis. 356; Cooley, Taxation, 501; *Wood v. Armour*, 88 Wis. 488; Black, Tax Titles, § 273. The mortgagee, being out of possession and not bound by any covenant, agreement, or promise to pay taxes, is under no obligation to pay the taxes on the mortgaged premises, and may acquire title to the property by a fair purchase at a tax sale and hold it like any other purchaser. Pingree, Mortgages, §§ 909, 2123; *Williams v. Townsend*, 31 N. Y. 411; *Kirkwood v. Thompson*, 2 De Gex,

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J. & S. 613; *Darcy v. Hall*, 1 Vern. 48; *Knight v. Marjoribanks*, 2 Macn. & G. 10; *Gjerness v. Mathews*, 27 Minn. 320; *Chambers v. Waters*, 3 Sim. 42; *Ten Eyck v. Craig*, 62 N. Y. 406; *Cameron v. Irwin*, 5 Hill, 280; *Shaw v. Bunny*, 13 Weekly Rep. 374, 2 De Gex, J. & S. 468; *Cholmondely v. Lord Clinton*, 2 Jac. & W. 183; *Cornell v. Woodruff*, 77 N. Y. 203; *Young v. Omohundro*, 69 Md. 424; *Beckwith v. Seborn*, 31 W. Va. 1; *Brevoort v. Randolph*, 7 How. Pr. 398; *Jackson v. Relf*, 26 Fla. 465; *Waterson v. Devoe*, 18 Kan. 223; *Bettison v. Budd*, 17 Ark. 546; *Ferguson v. Etter*, 21 id. 160; secs. 1158–1160, R. S. 1878.

For the respondent there was a brief by *McCausland & Smith*, and oral argument by *E. F. McCausland*. To the point that a mortgagee cannot take a tax title, they cited Black, Tax Titles (2d ed.), § 278; *Burchard v. Roberts*, 70 Wis. 111; *Fisk v. Brunette*, 30 id. 102; Blackwell, Tax Titles (5th ed.), §§ 566, 593; *Bassett v. Welch*, 22 Wis. 175; Cooley, Taxation, 503–505; sec. 1158, S. & B. Ann. Stats., note.

PINNEY, J. 1. Whether, as contended by the defendant *Storer*, it was agreed at the time of the foreclosure sale, and in consideration thereof, that the purchaser, Finch, assumed the payment of the four tax certificates, with interest, costs, and charges, which *Storer* held against the premises, and to reimburse him therefor, was a controverted question of fact, upon which the evidence is so conflicting that it is impossible to say that the finding of the court adverse to the contention of the defendant is against the clear preponderance of the evidence. We cannot, therefore, interfere to reverse this finding, and a discussion of the evidence upon which it is founded would lead to no profitable result. The parties neglected a salutary precaution in such cases, by failing to fully complete the business in hand, or to commit their agreement to writing; and after the foreclosure sale had been completed by the execution and delivery of the necessary

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deed and the payment of $5,551.46, the amount of the bid, the present controversy about the amount of the tax certificates occurred, which gave rise to the present action.

2. The general rule is stated to be: "A purchaser at a mortgage foreclosure sale acquires all the title and interest of both the mortgagor and mortgagee in and to the property. The court undertakes to dispose of the interests of the parties to the suit in the land, and the purchaser acquires those interests, whatever they may be. And it has been said that a sheriff's sale of real estate under a judgment recovered by *scire facias* upon the mortgage passes to the purchaser the title to the mortgaged premises, discharged of all equities,— even of those of which the mortgagee had no notice or knowledge." Wiltsie, Mortgage Foreclosure, § 577. In *Tallman v. Ely*, 6 Wis. 244, the court, speaking on the subject, said: "Whatever estate or title the mortgagee had in the mortgaged premises became merged in the decree, and passed to the purchaser at the judicial sale. Whatever estate or title the other parties to the suit had at its commencement passed by the same act to the same party. Such, it would seem, must be the necessary and inevitable consequence and result of the decree of foreclosure and sale, if any effect whatever is given to them."

Whatever doubt may have existed upon this subject has been put at rest by the statute (R. S. 1878, sec. 3169), which provides that, upon any foreclosure sale being made, "the sheriff or referee making the same, on compliance with its terms, shall make, execute and deliver to the purchaser a deed of the premises sold, setting forth each parcel of land sold to him, and the sum paid therefor, which deed, upon the confirmation of such sale, shall vest in the purchaser all the right, title and interest of the mortgagor, his heirs, personal representatives, and assigns, in and to the premises sold, and shall be a bar to all claim, right, or equity of redemption therein, of and against the parties to such action,

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their heirs, and personal representatives, and also against all persons claiming under them subsequent to the filing of the notice of the pendency of the action in which such judgment was rendered." The referee's deed to Finch, the purchaser at the foreclosure sale, upon the confirmation of such sale, passed to him whatever right, title, or interest the defendant *Storer* had in and to the premises sold, whether under the tax certificates in question, or either of them, or otherwise.

For this reason, and in view as well of the finding of the circuit court already noticed, the defense of *Storer* utterly fails; and it is not material to consider or determine whether the purchase by *Storer* of the tax certificates in question operated as a redemption of the lots from such tax sales, or as a payment of the taxes thereon. In any view, therefore, that may be taken of the case, the judgment of the superior court is correct.

By the Court.— The judgment of the superior court is affirmed.

DENSMORE COMMISSION COMPANY, Appellant, vs. SHONG, Respondent.

January 12 — February 8, 1898.

Partnership: Transfer of assets to corporation: Rights of creditors: Fraud: Execution levy: Replevin.

Where several persons who had been doing business as copartners, having a going mercantile business, formed a corporation, determined their respective interests in the partnership property, subcribed for stock in the corporation to the extent of such interests, conveyed the partnership property and business to the corporation, and respectively received therefor the stock subscribed, without making any special provision for the payment of the partnership debts, and thereafter continued the business in the same place,

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with the same property, but in the name of and for the corporation, and there is no evidence or circumstance to impeach the transaction for fraud, unless under sec. 2310, R. S. 1878, because of want of delivery, change and continued change of possession, of the things sold, the presumption of fraud arises, and thereafter some of the property was seized on executions issued on judgments against the partnership, the corporation replevied the same and the person making the seizure, in justification thereof, gave in evidence the executions but made no proof of his official character or of the existence of the judgments, other than by the production of such executions; *Held:*

(1) That proof of the existence of a valid judgment and of the official character of the person who made the seizure was essential to make out his defense, and that neither of such facts was established by the mere production of the execution.

(2) That a transfer of the property by the partners to the corporation, without in any way retaining any equity to have the partnership debts satisfied out of such property, left no remedy in that regard to the creditors, under the rule that the creditors of a partnership have no lien on, or equity in, partnership assets, independent of the equity of the partners.

(3) That the mere fact that the debts of the partnership were not provided for in the transaction, there being no proof that the members of the partnership were insolvent, was not sufficient to in any way impeach the *bona fides* of the transaction.

(4) That the statutory presumption of fraud was effectually rebutted by proof that a full consideration was paid for the property.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Action of replevin to recover property taken by defendant from the plaintiff, pretending to act under an execution against Orson W., Joseph M., and John D. Densmore. The evidence showed that for some time the Densmores were copartners in a mercantile business under the firm name of Densmore Bros.; that while so doing business they formed the plaintiff corporation, determined the amount of their respective interests in the partnership business, subscribed for stock in such corporation in proportion to such interests,

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then transferred such partnership property to such corporation in payment of such stock, and the stock was issued accordingly. The evidence further showed that the defendant, pretending to act under executions issued on judgments rendered against the Densmores, levied upon and took from the corporation some of the property transferred to it as aforesaid; that when the corporation was formed, the business formerly carried on by the Densmores was continued by the corporation at the same place and with the same property. The executions were offered and received in evidence against objection. At the close of the evidence the court directed a verdict in favor of defendant. There was a motion to set aside the verdict and for a new trial, which was denied, and the ruling duly excepted to. Judgment was rendered for defendant on the verdict, and plaintiff appealed.

The cause was submitted for the appellant on briefs by *H. V. Gard*, and for the respondent on the brief of *Arnold & Arnold*.

Counsel for the respondent contended, *inter alia*, that the organization of the corporation, as against third persons, was a mere change of name without affecting the ownership of the property. *Hatcher v. United Leasing Co.* 75 Fed. Rep. 368; *Bank v. Chattanooga Pulley Co.* 97 Tenn. 308; *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U. S. 337.

MARSHALL, J. It is first assigned as error that there was no proof offered to show that defendant was an officer or that he acted for a creditor in levying upon the property under the executions. Such facts were essential to his defense, and there seems to have been an absolute failure of proof in regard thereto. *Marks v. Wright*, 81 Wis. 572.

It is further contended by appellant that no indebtedness was shown. The mere production of an execution, fair on its face, purporting to have been issued on a judgment against persons therein named as judgment debtors, does

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not prove the existence of such judgment or the amount due thereon, so as to establish the right of an officer who may have seized property thereunder to hold such property for the satisfaction of such execution, when the right so to do is challenged as in this case. Such right can be sustained, when so challenged, only by showing the existence of a valid judgment and the amount due thereon. *Marks v. Wright, supra.* Here no judgment was shown. The defect in the proof was fatal to defendant's case. The trial court probably acted, in directing the verdict in defendant's favor, on the theory that the execution *prima facie* established the existence of the judgment. That was error, for which the judgment appealed from must be reversed.

It is further assigned as error that there was no evidence to impeach the title of the plaintiff corporation for fraud, hence no warrant for holding that the property was liable to seizure for the debts of the Densmores after they had sold the same to the plaintiff. There is no evidence that the Densmores were insolvent at the time of the transfer, nor any fact established to impeach the *bona fides* of the transaction whereby the corporation became the owner of the property, except that no provision was specially made for the payment of the debts of the partnership, and that the members of the firm, acting for the corporation, remained, as agents of such corporation, in possession of the property, and conducted the business at the same place as before, but in the name of the corporation instead of that of the firm. A creditor of a partnership, as such, has no lien on the partnership assets, nor any equity therein independent of the equity of the partners. So long as the equity of the latter exists, to have the debts of the partnership satisfied out of the partnership assets, it may be enforced by the creditors. A transfer of the partnership property free from fraud cuts off such equity of the partners, and the equity of the creditors, which depends upon it, falls at the

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same time by the same act. This subject was so fully discussed by this court in *Thayer v. Humphrey*, 91 Wis. 276, that it is not deemed necessary to go over the same at this time. It was there said, in effect, that if a member of a firm makes a *bona fide* sale of his interest in the partnership property to his copartner or to a stranger, without in any way retaining his equity to have the partnership creditors paid out of such property, the title thereto is thereby vested in the new owner, free from any claim of the vendor or his creditors through him.

From the foregoing it follows that the title to the property in dispute was in plaintiff free from any claim of the creditors of the firm at the time the levy on such property was made, unless such title was impeached for fraud. The mere fact that the debt of the firm was not provided for, there being no proof in the case that the members of the firm were insolvent when the transfer was made, did not raise even a suspicion of fraud. So it comes down to the subject of want of change and continued change of possession as evidence of fraud under the statute. Sec. 2310, R. S. 1878, provides that, "every sale made by a vendor, of goods and chattels in his possession or under his control, . . . unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold . . . shall be presumed to be fraudulent and void, as against the creditors of the vendor, . . . or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale, . . . that the same was made in good faith, and without any intent to defraud such creditors or purchasers." Now, though it is apparent from the evidence that there was all the delivery to the purchaser, change and continued change of possession, that the nature of the case would permit, assuming that the circumstances were such, under the statute,

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as to raise a presumption of fraud, the proof is undisputed that the corporation paid full value for the property, by issuing corporation stock therefor, which it had an undoubted right to do under the statute. Sec. 1753, R. S. 1878. That circumstance, so established, effectually rebutted the presumption of fraud arising from mere want of actual change and continued change of possession, if there were such. The law is well settled in this state that the legal presumption of fraud, arising under the statute in favor of the creditor of a vendor out of the mere fact that such vendor has sold property to another and thereafter retained possession of the same, is rebutted by proof of the payment of a full consideration for such property to the vendor by such other. *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529.

It follows from the foregoing that, as the case stood at the close of the evidence when the court directed a verdict for the defendant, there was no evidence to impeach the title of the plaintiff to the property on the ground of fraud, and if the facts were otherwise, there was no proof that the defendant represented a creditor of the Densmores or was in a position to attack the transfer by them to the corporation on the ground of fraud or any other.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

VOLK and others, Appellants, vs. STOWELL, Respondent.

January 12 — February 8, 1898.

Executors and administrators: Right to realty: Contracts: Death of one party: Agency coupled with an interest.

1. An administrator cannot maintain an action for the recovery of his decedent's real estate, unless it is shown that it is needed for the payment of debts or legacies.

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2. Defendant and plaintiffs' testator entered into a contract providing that the defendant should manage the testator's farm for a term of five years; that he should receive therefor $30 per month, and in addition fifteen per cent. of the farm products and increase of stock, and should be allowed the use of certain buildings and a garden; that the testator might declare the contract forfeited only in case of failure or neglect of the defendant to perform it according to its true intent and meaning; and that upon the death of the defendant the contract should be determined and any wages due him should be paid to his heirs or legal representatives by the testator or "his heirs, representatives, or assigns, upon whom this contract shall be binding." By his will, made soon after, the testator bequeathed the revenues, benefits, and profits arising from said farm to his grandchildren, each to be paid his proper share thereof after attaining his majority, until which time said proceeds were to be paid to the testator's children. *Held*, that the contract vested in the defendant an agency or authority, coupled with an interest, which survived the testator and became binding on his heirs and personal representatives, and entitled the defendant to continue to manage the farm as stipulated in the contract.

APPEAL from a judgment of the circuit court for Polk county: A. J. VINJE, Circuit Judge. *Affirmed.*

This was an action for the recovery of certain real estate, called the "Hermitage Farm," situated on the north shore of Poplar lake, in Polk county, of which Leonard W. Volk died seised August 19, 1895, having made on the 1st of April, 1895, a written agreement with the defendant, *Stowell*, by which it was agreed that the latter should take charge of the management, care, and cultivation of said farm, or any additional adjoining land that might be thereafter purchased by said Volk, for a term of five years from that date, subject to extension, as the parties might mutually agree. The defendant was to devote his entire time and best effort to the management, care, and cultivation of said farm, and to faithfully and diligently serve the exclusive interests of the said Volk therein, for the designated period. Volk agreed to pay the defendant therefor a monthly salary of $30, pay-

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able at the end of each month, and to furnish him a hired man or strong boy of about eighteen years of age, and during harvest time, if necessary, to furnish an extra man or boy. Besides the monthly salary or wages to be paid said *Stowell*, said Volk was to allow him additional fifteen per cent. of all increase of stock (quadrupeds and bipeds) born or hatched on the said farm; also fifteen per cent. of all products of the soil, field, and garden.

Among other things, it was agreed that any stock might be sold from time to time or increased according to the wishes or direction or option of Volk. The defendant was "to have the use of the farm house, fuel, and private garden free." The "Lodge," so called, on the premises, was exclusively for the use of Volk, as well as the log house at east end of farm, with a small garden and granary. All original stock was to be kept good according to schedule, if the sixty acres, more or less, produced food sufficient to feed them through the winter. It was agreed that at the end of every six months the monthly percentage might be increased or reduced, according to the yield of stock and products of the soil, as might be mutually agreed upon between said Volk and the defendant. "In case of failure or neglect of the defendant to perform the covenants and agreements on his part, . . . the contract should, at the option of said Volk, become forfeited and determined;" and, in such event, the defendant agreed "to immediately surrender up the premises to said Volk." In case of the death of the defendant before the expiration of the contract, the same should terminate, and any wages or percentages due to him at that time were to be paid to his heirs or legal representatives "by said Volk, or his heirs or representatives or assigns, upon whom this contract shall be binding."

By the last will and testament of said Volk, which has been duly admitted to probate, he devised the premises in question to his grandchildren then living, the issue of his son

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Stephen A. Douglas Volk and his wife, Marion Laribee Volk, and to his grandchildren then living, the issue of his daughter *Elizabeth Honora* and her husband, William B. Colt, naming them, or any other grandchildren who might thereafter be born; that is to say, as each of said grandchildren should reach the lawful age, he or she should be entitled to their proportion of the revenues, profits, and benefits of whatsoever kind of said farm, to be divided by the probate judge of said Polk county, or such trustee as he might appoint, as the guardian and trustee or executor. Their parents, during the minority of the grandchildren, were to be entitled to all revenues, divided equitably, etc.

The parents of the grandchildren mentioned in the will, *Stephen A. Douglas Volk* and *Nora Volk Colt*, are children of the testator, and they brought this action for the recovery of the premises in question, charging the defendant with unlawfully withholding the same. The answer was a general denial. *H. P. Burdick*, administrator of the estate of said Leonard W. Volk with his will annexed, was subsequently joined as a party plaintiff.

Upon trial by the court, the facts were found as stated, and that the defendant had occupied the premises under and by virtue of said contract from its date, and still occupied the same, and that said Leonard W. Volk lived upon the same after the contract was made to the time of his death. The circuit court held that the defendant was entitled to the possession and occupancy of the farm house on the premises, and such possession as would enable him to take charge of the management, care, and cultivation of the farm according to the terms of the contract; and that the plaintiffs were not entitled to the exclusive possession of the premises; and gave judgment dismissing the action, from which the plaintiffs appealed.

The cause was submitted for the appellants on the brief of *H. P. Burdick*, and for the respondent on that of *Frank B. Dorothy*.

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PINNEY, J. 1. There is neither allegation nor proof to show that the rents and profits of the real estate in question were needed for the payment of debts of the testator or in the settlement of his estate, or that he left debts unpaid or not provided for. At common law, the executor or administrator had nothing to do with the real estate of which the testator or intestate died seised. *Jones v. Billstein*, 28 Wis. 221. When there are no debts or legacies to be paid, there is no valid reason why the executor or administrator should have the possession of the real estate. *Flood v. Pilgrim*, 32 Wis. 376; *Filbey v. Carrier*, 45 Wis. 469; *McManany v. Sheridan*, 81 Wis. 542. The burden of proving that there were debts of the testator to be paid was on the plaintiff *Burdick*, seeking a recovery of the premises as administrator of the estate of the deceased with his will annexed. It appears from the will itself that no legacies were given by it, and it seems clear that no recovery in the action could be had by the administrator, *Burdick*.

2. Whether there could be a recovery by the plaintiffs *S. A. Douglas Volk* and *Nora Volk Colt*, children of the testator and parents of his grandchildren named in the will, and to whom the revenues, profits, and benefits of the farm were devised until each such grandchild should reach the lawful age, when he or they should be entitled to their proportion of such revenues, profits, and benefits, is a question depending upon the legal effect of the contract made by the defendant with the testator, April 1, 1895, in view of the subsequent death of Leonard W. Volk. The contention on the part of the plaintiff is that the contract is, in effect, a contract between master and servant, upon a specified compensation to the latter, which would be terminated upon the death of either party, upon the ground that, "in contracts in which the performance depends upon the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the per-

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ishing of the person or thing shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing." The death of one contracting party does not operate as a release or discharge from the performance of his part of the agreement, where it is of such a character that it may be performed by his personal representatives. *Hawkins v. Ball's Adm'r*, 18 B. Mon. 816, 68 Am. Dec. 755. Where the agreement is for services which involve the peculiar skill of an expert by whom alone the particular work in contemplation of the parties can be performed, and where distinctly personal considerations are at the foundation of the contract, the relation of the parties is dissolved by the death of him whose personal qualities constituted the particular inducement to the contract. If a party agrees to do that which does not necessarily require him to perform in person,— that which he may, by assignment of his contract or otherwise, employ others to do,— it may be fairly inferred, unless otherwise expressed, that a mere personal relation was not contemplated. *Billings' Appeal*, 106 Pa. St. 558. It is a presumption of law that the parties to a contract bind, not only themselves, but their personal representatives; and executors, therefore, whether named in the contract or not, are liable on the contracts of the testator which are broken in his lifetime, and, with the exception of contracts in which personal skill or taste is required, on all such as are broken after his death. Chitty, Cont. (13th ed.), 130; *Siboni v. Kirkman*, 1 Mees. & W. 418. An ordinary contract of lease is not such a personal contract as is extinguished by the death of the lessor or lessee. *Lockart v. Forsythe*, 49 Mo. App. 654. The executors or administrators are in truth contained in the person of the testator or intestate, except in the case of a *personal* contract,— that is, a contract depending on personal skill,— in which is always implied the

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condition that the person is not prevented by the act of God from completing the work. In *Wills v. Murray*, 4 Exch. 865, PARKE, B., said: "No proposition is clearer than that, as a general rule, the executor represents the person of his testator with respect to all his rights and liabilities on all his contracts." The executors of every person are implied in himself and bound without naming them. The same rule applies to administrators. *Hyde v. Skinner*, 2 P. Wms. 196, 197. His personal representatives continue to be bound so far as the means to complete such contracts have come to their hands.

The contract under consideration is a peculiar one, and somewhat in the nature of a lease. It conferred on the defendant many of the rights of a tenant under such an instrument. Manifestly, it gave the defendant, during the period specified in the contract, an interest in the possession and use of the farm. It gave him authority to manage, care for, and cultivate it, and to diligently serve the exclusive interests of Volk therein for the period specified, to the end that he might become entitled to the percentages stipulated of stock and products of the soil, which were to be derived and arise out of the land by the cultivation of the farm and performance of the contract, and it would seem reasonably clear that the devisees of Volk took the premises subject to the rights of the defendant in these respects. He was to have during the stipulated period the use of the farm house, fuel, and private garden free, Volk retaining the option to declare the contract forfeited and determined only in case of failure or neglect of the defendant to perform the covenants and agreements contained in it on his part according to their true intent and meaning, in which event he was to immediately surrender up the premises to said Volk.

It is a question of intention of the parties, as derived from the provisions of the contract and the subject to which it relates, as to whether it was to continue in force after the death of Volk; and upon this question the provision of the

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testator's will, made within about two weeks after the contract, is quite significant as to the intention of Volk, providing for a division of the "revenues, profits, and benefits of whatsoever kind of said farm, by the probate judge of said Polk county, or such trustee as he may appoint, as the guardian and trustee or executor," taken in connection with the provision that the plaintiffs, the parents of the grandchildren mentioned in the will, during their minority, were to be entitled to all revenues, divided equitably according to said trustee's decision. Evidently Volk did not intend that his death should operate to extinguish the contract, but that its provisions should remain in full force, and be executed by and between the defendant and Volk's personal representatives.

The contract clearly vested in the defendant an agency or authority, coupled with an interest in the subject matter of the business to which it related. So far as the stipulations on the part of Volk are concerned, no legal obstacle is perceived to their being performed by his personal representatives. The stipulated percentages of all increase of stock raised on the farm, and fifteen per cent. of all products of the said soil, field, and garden, were matters in respect to which he might transfer an interest to the defendant. They were possibilities coupled with his existing interest in and ownership of the farm and stock thereon, and which might result from the performance of the contract. The right of the defendant to such percentages and the occupancy of the farm and farm house in order that such percentages and profits might be realized, was clearly vested in the defendant, and survived after the death of Volk, to be enforced, if need be, against his personal representatives.

We think that the implication necessarily arises from the stipulation in the contract that it should be determined upon the death of the defendant and that any wages or percentages then due him should be paid to his heirs or legal representatives by said Volk, or his heirs, representatives, or

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assigns, *upon whom this contract shall be binding*, that its provisions would continue in force notwithstanding the death of Volk. So, also, the option of Volk to declare the contract forfeited in case of failure or neglect on the part of the defendant to perform the covenants and agreements contained in the contract on his part according to their true intent and meaning, in which event the defendant was to immediately surrender up the premises to said Volk, raises a clear implication that, in case of faithful performance of the provisions of the contract on the part of the defendant, his rights in the premises would continue during the stipulated term.

From the construction and effect thus given to the provisions of the contract it necessarily results that the defendant, after the death of the testator, continued to be entitled to the management, care, and cultivation of the farm, and to render services thereon in its care and cultivation, as stipulated in the contract. It follows that the plaintiffs were not entitled to the exclusive possession of said premises, or to recover them before the expiration of said term, as against the defendant, and the judgment of the circuit court dismissing the action must for these reasons be affirmed.

By the Court.— The judgment of the circuit court for Polk county is affirmed.

ANDERSON, Respondent, vs. DOUGLAS COUNTY, imp., Appellant.

January 12 — February 8, 1898.

Limitations: Pleading: Taxation: Restraining issuance of deed: Matters affecting groundwork of tax: Improper assessment: Tender of amount justly chargeable.

1. The admission of service indorsed upon the back of a summons and complaint cannot be considered in passing upon a demurrer based upon the statutes of limitation, since, under sec. 2649, R. S. 1878, a

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demurrer reaches only such defects as appear upon the face of the complaint.

2. In an action to restrain the issuance of a tax deed, to set aside the tax sales, and for a reassessment, allegations that the common council of Superior levied upon the taxable property of the city a certain amount for the "general fund," without further explanation; that the county treasurer added an excessive amount of interest; and that the requisite notices for making certain improvements for which the property was assessed were not given, are *held* not to state a cause of action, since the matters alleged do not affect the groundwork of the tax.

3. The intentional assessment of vacant lands for a much greater amount in proportion to their value than improved lands, for the purpose of encouraging improvements, to the great injury of the owner of such vacant lands, is a defect going to the validity of the assessment and affecting the groundwork of the tax, such as authorizes the interference of a court of equity.

4. In an action to restrain the issuance of a tax deed based on such an assessment, payment or tender of the amount justly chargeable to the plaintiff's lands need not be alleged, since it is impossible to ascertain, by computation or otherwise, the amount so justly chargeable; nor need the plaintiff allege a willingness to pay, an allegation of such mere mental condition, incapable of disproof, being of no benefit to defendant.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *H. H. Grece* and *H. C. Sloan*, and for the respondent on that of *Michael S. Bright.*

CASSODAY, C. J. This is an action to restrain the defendants from issuing any tax deed upon any of the plaintiff's land described, and to have all of the tax sales therein mentioned held void and canceled, and for a reassessment for all and singular the taxes mentioned. The defendants *Douglas County* and the county clerk demurred to the complaint for the reason that it does not state facts sufficient to constitute a cause of action against these defendants; that the action was not commenced within the time limited by sec. 1210*h*,

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S. & B. Ann. Stats., as amended, and certain provisions of the charter. From an order overruling such demurrer the defendant *Douglas County* appeals.

The complaint, among other things, alleges that the assessors for the city for 1891, in violation of law, intentionally and purposely pursuing a settled policy and plan, assessed vacant lands a much greater sum in proportion to their value than improved lands, for the unlawful purpose of encouraging the improvement of unimproved property in the city; that the plaintiff was greatly injured by such acts of the assessors, for the reason that her property was mostly unimproved, and a much greater burden of taxation was thereby thrown upon her than she ought, in justice, to bear. Assuming this to be true, as we must upon this appeal, and it brings the case within the provisions of the statute which declare that "every action or proceeding to set aside any sale of lands for the nonpayment of taxes, or to cancel any tax certificate, or to restrain the issuing of any tax certificate or tax deed, for any error or defect going to the validity of the assessment and affecting the groundwork of such tax, shall be commenced within one year from the date of such tax sale and not thereafter." S. & B. Ann. Stats. sec. 1210*h*; *Morrow v. Lander*, 77 Wis. 80; *Muskego v. Drainage Comm'rs*, 78 Wis. 45. The demurrer, however, only reaches such defects as "appear upon the *face*" of the complaint. R. S. 1878, sec. 2649. When the matters complained of "do not appear upon the face of the complaint, the objection may be taken by answer." R. S. 1878, sec. 2653. Under these statutes, it has frequently been held by this court, in effect, that a demurrer based upon the statutes of limitation cannot be sustained by any fact appearing in the record *dehors* the face of the complaint. *Zœgel v. Kuster*, 51 Wis. 31; *Gage v. Wayland*, 67 Wis. 566; *Benedix v. German Ins. Co.* 78 Wis. 77. This precludes us from looking into the admission of service indorsed upon the back of the summons and complaint.

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The complaint alleges other defects which do not affect the groundwork of the tax, as, for instance, that in November, 1891, the common council levied upon the taxable property in the city $249,000 for city taxes, including $61,000 designated therein as "general fund," without any other explanation, and that the city had no power or authority to levy any general fund or contingent fund tax, and hence that such levy was void; and also that the county treasurer added an excessive amount of interest; and also that the requisite notice for making certain improvements was not given. In *Hayes v. Douglas Co.* 92 Wis. 429, it was held, in effect, "that the levy of a certain sum for the 'general fund' is not invalid merely because it was not included in the estimates filed and there was no detailed statement of the items of which it was composed." It was there further held that, "even if such a levy is void, still, unless the tax is excessive and unequal and unjust, a court of equity will not interfere to set aside a sale, based on that and other taxes, without payment of that tax as a condition of relief." This last proposition was expressly sanctioned in *Chicago & N. W. R. Co. v. Forest Co.* 95 Wis. 80, 89. This is in pursuance of an equitable rule firmly sanctioned by this court in numerous decisions. *Fifield v. Marinette Co.* 62 Wis. 532; *Wisconsin Cent. R. Co. v. Ashland Co.* 81 Wis. 10 *et seq.*; *Hixon v. Oneida Co.* 82 Wis. 531, and cases cited in the opinions. The rule is recognized in the recent case of *Wells v. Western P. & S. Co.* 96 Wis. 116, where it was, among other things, held: "(3) If such excess can be determined by mere computation or without proof, failure to plead an offer to pay the balance will be fatal to the cause of action. (4) A failure to tender or offer to pay the balance before suit will be fatal to any claim for costs. (5) If the excess cannot be determined by computation and without proof, the court should determine the same, as near as practicable, to a reasonable certainty, from the evidence produced on the trial."

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In as far as the defects alleged do not go to the validity of the assessment and affect the groundwork of such tax, it is very evident, from authorities cited, that the complaint fails to state a cause of action. But in so far as it alleges a corrupt and fraudulent assessment, to the great injury of the plaintiff, it did go to the validity of the assessment and affected the groundwork of such tax; and hence it was impossible for the plaintiff to determine, by computation or otherwise, what amount of such taxes was justly chargeable against her lands. This being so, she could not pay nor tender payment of the same, and hence she could not allege such payment or tender. There is therefore no good reason for requiring her to allege her willingness to pay, since in case a reassessment should be ordered upon issue joined and trial had, the law would require her to pay into court the amount of such valid reassessment. S. & B. Ann. Stats. sec. 1210*b*. An allegation of such mere mental condition would be of no benefit to the defendant, and would be incapable of disproof. As to that branch of the case we think the demurrer was properly overruled.

By the Court.— The order of the circuit court is affirmed.

PEARSON, Appellant, vs. SWITZER, Respondent.

January 12 — February 8, 1898.

Contracts: Pleading: Recovery quantum meruit.

1. In an action to recover a balance alleged to be due for services rendered under an express contract to pay specified wages, plaintiff cannot — at least not without amending his complaint — recover the reasonable value of his services, or introduce evidence upon that question.
2. On October 6 defendant hired plaintiff to take charge of his mill at C. at $60 per month. During November and December defendant moved his mill to G. On December 27 the parties settled for the work already done at the agreed price, and plaintiff was fully

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paid. On January 1, following, plaintiff at defendant's request went to work at G. and continued to work there until September of the year following. He kept defendant's books, but did not credit himself with the $60 per month after January 1, as he had done before. *Held*, that he was not entitled to recover under the express contract for work done after January 1.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *George H. Singleton* and *James J. Lunney*, attorneys, and *W. H. Stafford*, of counsel, and oral argument by *Mr. Stafford.*

For the respondent the cause was submitted on the brief of *Connor & Leonard.*

WINSLOW, J. This is an action to recover a balance claimed to be due upon wages for twenty-three months under an express contract to pay $60 per month, and to establish and enforce a lien therefor on certain lumber. The answer admitted the labor, but claimed that a part only was done under an express contract at $60 per month, namely, from October 6 until December 31, 1893, which had been fully paid, and that the remainder of the services from the last-named date until September 3, 1895, were rendered without express contract, but simply under a general hiring upon *quantum meruit;* and that the reasonable value of such last-named services was only $40 per month, which had been fully paid. At the close of the trial a verdict was directed for the defendant.

We have reviewed the evidence, and are satisfied that a verdict was rightly directed. There was really no material dispute as to the original hiring. The defendant had a planing mill at Cartwright, Wisconsin, and hired the plaintiff to take charge of it October 6, 1893, at $60 per month. The plaintiff himself testifies: "He [the defendant] offered me the position of looking after his business in general *at Cart-*

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wright, for which I was to receive $60 per month. We agreed on the wages." In November and December of the same year the defendant moved his mill and business to Glen Flora. December 27, 1893, the parties settled for the work already done at the rate of $60 per month, and the plaintiff was fully paid. On the 1st of January, 1894, the plaintiff, at defendant's request, went to work at Glen Flora, and continued to work until September, 1895. He kept the defendant's books, but never credited himself salary at $60 per month, or at any fixed amount, after January 1st, although he had done so before that time. The defendant showed by ample testimony that the plaintiff's services were only worth $40 per month after January 1st, and there was no testimony to contradict this. It was undisputed that the defendant had fully paid for the services rendered at this last-named rate. The action was upon express contract only, and the plaintiff's own evidence shows that the express contract was only for work at Cartwright, and was closed and paid for in December, 1893. There is no basis in the evidence upon which it could be found that the subsequent work at Glen Flora was under the express contract.

As no claim to recover upon *quantum meruit* was made in the original complaint, the plaintiff was in no position to recover the reasonable value of his services, or to offer evidence upon that question, at least until by an amendment to his complaint he had laid the foundation for such a claim. This is not like the case of *Beers v. Kuehn*, 84 Wis. 33, where the complaint charged both express contract and an implied contract to pay the reasonable value. Here the plaintiff stood upon his averment of express contract to pay a specified sum from beginning to end, and affirmatively showed that the express contract was closed and paid in full.

These views render unnecessary the discussion of any other questions.

By the Court.— Judgment affirmed.

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ROBERTS, County Judge, Appellant, vs. WEADOCK and others, Respondents.

January 13 — February 8, 1898.

Estates of decedents: Judgment ordering payment of claims: Collateral attack: Action on administrator's bond: Practice: Pleading.

1. Under secs. 3853, 3856, 4014, R. S. 1878, to the effect that, after the time limited for creditors to file their claims in the settlement of the estate of a deceased person, the county court shall make an order for the payment of the debts in whole or in part, or a dividend thereon, according to the circumstances of the estate; that when the time shall have expired under such order or judgment, the executor or administrator and his bondsmen shall stand personally liable for such debts; that on refusal of such executor or administrator to comply with the demand for such payment, as to any creditor, an action may be brought against such executor or administrator and his bondsmen, for such debt, by permission of the court,— the order or judgment for payment, though made without notice, is not subject to collateral attack. Till reversed on appeal, or set aside in some direct proceeding for that purpose, it is conclusive on all the questions necessarily adjudicated and included within it, among others, that there is a sufficiency of assets to pay the debts.
2. The order permitting suit on the bond may be entered without notice, and is not open to collateral attack. The condition precedent of demand for payment and refusal, which must precede the entry of the order, is not open to question except on appeal from the order, or in some direct proceeding to vacate or avoid it; and if that were not so, an allegation of demand and refusal in the complaint, not put in issue by the answer, is thereby admitted for the purposes of the action upon the bond.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Action on an administrator's bond. The estate of E. V. Mundy, deceased, being in process of settlement in the probate court of Douglas county, Wisconsin, such proceedings were there duly had that a claim for $2,000, with interest

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thereon from March 22, 1890, was allowed in favor of Robert C. Ray and James D. Ray. Thereafter James D. Ray died, and Robert C. Ray was appointed as executor of his estate. Defendant *Weadock* was the executor of the estate of E. V. Mundy, deceased, and the other defendants were his bondsmen. Such proceedings were had after the allowance of the claim as aforesaid, that the county court entered an order for the payment of such claim within a time therein mentioned. Such order was made on a petition setting forth, among other things, the allowance of the claim, and that there was sufficient property belonging to the estate, applicable to its payment, to pay it in full. The order recited as a fact established on the hearing that there was sufficient property in the hands of the executor to pay the claim. Service of the notice of the hearing on the petition was ordered to be made on Ross, Dwyer & Hanitch, attorneys for the executor, and they appeared on such hearing. The claim was not paid as required by the order, and such proceedings were thereafter duly had that the county court, by order, authorized the bringing of this action against the executor and his bondsmen to recover therefor.

The complaint sets forth by appropriate allegations all of the aforesaid facts, and that after the claim was ordered to be paid plaintiff demanded payment thereof of the executor, which was refused. The defendants answered, admitting all the facts alleged in the complaint, down to and inclusive of the order for the payment of the claim. There was no denial of the allegation of demand for payment pursuant to the order, or of the due making of the order, or that the same had not been appealed from or set aside. There was a denial of the sufficiency of assets.

On the trial there was evidence on the part of plaintiff that one of the attorneys for the claimants, after the entry of the order for payment of the claim, had some talk with the executor in respect to such payment. There was also

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evidence that the executor informed such attorneys by letter that there was no money with which to pay the claim; also evidence by the executor to the same effect. Proof was made of all proceedings in the probate court as alleged, and there was no proof to the contrary, except the recital in the order authorizing suit, that the executor appeared in the proceedings to obtain such order, was disproved.

At the close of the evidence defendants' counsel moved the court for a nonsuit, which was granted and the ruling duly excepted to. Judgment was rendered accordingly in defendants' favor, and plaintiff appealed.

For the appellant there was a brief by *Reed & Reed*, attorneys, and *Mann & Corcoran*, of counsel, and oral argument by *Myron Reed*. They argued, among other things, that the judgment of the county court for payment of the claim cannot be attacked collaterally in this action. It is not a defense that the executor could not comply with the order or judgment. If he thought it was wrong and unjust he should have appealed under the provision of sec. 4031, R. S. 1878. *Shepard v. Pebbles*, 38 Wis. 373; *Heard v. Lodge*, 20 Pick. 53; *Newcomb v. Goss*, 1 Met. 333; *Stovall v. Banks*, 10 Wall. 583; *Garber v. Comm.* 7 Pa. St. 265; *Willey v. Paulk*, 6 Conn. 74; *Fay v. Ames*, 44 Barb. 328; *Watts v. Gayle*, 20 Ala. 817; *Love v. Gibson*, 2 Fla. 598; *Holden v. Lathrop*, 65 Mich. 652; *Clark v. Fredenburg*, 43 id. 263; *Beall v. New Mexico*, 16 Wall. 535, 541; *Brush v. Button*, 36 Conn. 292; *Meyer v. Barth*, 97 Wis. 352. The order or judgment of the probate court is conclusive upon all the parties, sureties as well as principal. When parties contract with reference to some suit or proceeding in court they are all bound by the judgment therein. They become *quasi* parties to the proceeding and are bound by it. *Pratt v. Donovan*, 10 Wis. 378; *Booth v. Ableman*, 20 id. 602; *Ketchum v. Zeilsdorff*, 26 id. 514; *Smith v. Lockwood*, 34 id. 72; *Shepard v. Pebbles*, 38 id. 378.

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For the respondents there was a brief by *Thomas A. E. Weadock*, in person, and *Ross, Dwyer & Hanitch*, attorneys for the other defendants, and oral argument by *Mr. Weadock* and *Mr. W. D. Dwyer*.

MARSHALL, J. The questions presented on this appeal are familiar and simple. Sec. 3853, R. S. 1878, provides that, "after the time limited for creditors to present their claims has expired, and the amount of the indebtedness of the deceased has been ascertained by the court or commissioners, such court shall make an order or judgment for the payment of the debts of the deceased, in whole or in part, out of the assets in the hands of the executor or administrator for that purpose, as the circumstances of the estate shall require." Sec. 3856, R. S. 1878, provides that whenever an order or judgment shall have been made as provided in sec. 3853, "the executor or administrator, after the time fixed for the payment shall arrive, shall be personally liable to the creditors for their debts or the dividend thereon, as for his own debt; and he shall be liable on his bond, and the same may be put in action on the application of a creditor whose debt or dividend shall not be paid" as provided in the order or judgment. Sec. 4014 provides that an action may be brought on the bond of the executor or administrator by permission of the county court, by any creditor, when the amount due him has been ascertained and ordered paid by the court, if the executor, administrator, or trustee shall neglect to pay the same when demanded.

There can be no question but that the complaint states a good cause of action under the sections of the statutes referred to. The order for the payment of the claim is set forth at length in the complaint, and recites as facts found in favor of the claimants, on the application for such order — First, that the time limited by the court for creditors to present their claims against the estate had expired; second,

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that the amount of the indebtedness of the estate had been ascertained; third, that there were sufficient assets in the hands of the executor for the payment of all the indebtedness of the estate in full, after paying all the expenses of administration. On such facts, it devolved on the county court, by the mandatory language of sec. 3853, to render judgment in favor of the plaintiff for the payment of his claim, as was done. There is no requirement for the giving of notice of the application for the order or judgment, any more than for the application for leave to sue under sec. 4014, and while it was proper to give such notice, it was not requisite to the jurisdiction of the court. *Elwell v. Prescott*, 38 Wis. 274; *Landon v. Comet*, 62 Mich. 80.

The entry of the order or judgment referred to, and expiration of the time limited therein for payment of the claim, by the express language of sec. 3856, R. S. 1878, made the claim, to all intents and purposes, the personal debt of the administrator for which he was liable, and his bondsmen were liable as well. Upon its being made to appear that the executor refused to pay the claim upon demand therefor, pursuant to the order or judgment, the court properly, and without notice, authorized the bringing of this action under sec. 4014, R. S. 1878.

Considerable evidence was taken on the trial in regard to the subject of demand for payment, and one of the points most confidently suggested in support of the judgment is that no such demand was shown; but inasmuch as such demand was distinctly alleged in the complaint and not denied by answer, it stands, for all the purposes of the case, as a fact admitted; therefore, if the court granted a nonsuit for want of a demand for the payment of the claim, it was error. Moreover, it is considered that the order for leave to bring the suit, until set aside or vacated on appeal or some proper proceedings, is conclusive on that question.

The only other question which appears to have been con-

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tested by the defendant was whether there were sufficient assets in his hands with which to pay the claim. That was one of the very questions upon which the county court was required to form an opinion and pronounce judgment, on the application for such payment; hence, such judgment is conclusive for the purposes of this case. The general rule is that when a court has jurisdiction to render a judgment, every proposition assumed or decided, leading up to the final result, the order or judgment, is included within it, and till reversed on appeal or set aside in some direct proceeding for that purpose it is conclusive for the purposes of that case or proceeding upon all parties thereto, in that and all courts. Wells, Res Adjudicata, § 217; *Giffert v. West*, 37 Wis. 115; *Quackenbush v. W. & M. R. Co.* 71 Wis. 472; *Cramer v. Stone*, 38 Wis. 259; *Pray v. Hegeman*, 98 N. Y. 351; *Iowa Co. v. M. P. R. Co.* 24 Wis. 93; *Danaher v. Prentiss*, 22 Wis. 311. This familiar rule applies to all courts to the extent of their jurisdiction. Probate courts are as much within the rule as any other. *Barker v. Barker*, 14 Wis. 131, and *Cody v. Cody*, *post*, p. 445.

The bondsmen of the executor are concluded by the judgment of the county court, the same as the principal. One of the provisions or conditions of the bond is that the executor shall perform all orders and judgments of the county court. By that condition the bondsmen were, through their principal, essentially parties to all proceedings in the court, and bound to the same extent as such principal. The question of the conclusiveness of a decree of the county court, against the principal, upon his bondsmen, is not new in this court. It was expressly decided in *Holden v. Curry*, 85 Wis. 504, and *Schoenleber v. Burkhardt*, 94 Wis. 575.

From the foregoing it follows that the answer of the defendants admitted every allegation of the complaint essential to plaintiff's right to recover, and that so long as the order of the county court for the payment of the claim in

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question remains undisturbed on appeal or some direct proceeding for that purpose, or is not shown to be void for want of jurisdiction of the court to enter it, the executor is personally liable for its payment, and his bondsmen are liable therefor as well. The plaintiff was entitled, clearly, to a judgment upon the pleadings alone, and that right was in no way impaired by any evidence that was produced in the case.

If the result here reached is prejudicial to the executor, it is not the fault of the law, but neglect on his part to resort to the ample remedies which the statutes give. He had the right to appeal from the order or decree for payment of the claim, within sixty days after it was made, under sec. 4031, R. S. 1878, and under sec. 4035, R. S. 1878, power existed in the circuit court, if justice required, to allow an appeal from the order, after the expiration of the time limited therefor by sec. 4031, upon petition being filed within one year from the act complained of. So the misfortune to the executor, of being required to pay a claim when there are no trust funds for that purpose, if such misfortune exists, is very clearly attributable to his own laches.

If there is any rule laid down in *Hilton v. Briggs*, 54 Mich. 265, confidently relied upon by respondents, in conflict with what is here decided, it is considered that such rule is contrary to well-settled principles and numerous adjudications of this court.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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BORDEN, Respondent, vs. DAISY ROLLER MILL COMPANY, Appellant.

January 13 — February 8, 1898.

Master and servant: Negligence: Defective appliances: Assumption of risk.

1. Where an experienced mechanic is injured by the slipping of a ladder on the floor where he was using it, such ladder being one of the ordinary tools in use in and about the premises and selected by such mechanic on the occasion of such injury, it was error to instruct the jury that, as a matter of law, the master was negligent because of some defect in the ladder, which was open and obvious to any person paying reasonable attention thereto.
2. A servant is not ordinarily obliged to search for defects in instrumentalities furnished for his use; nevertheless, in the use of ordinary tools, he takes the risk of all defects therein which are open and obvious to a person of ordinary care, by reasonable attention to them as they are used.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

Action for the recovery of compensation for personal injuries alleged to have been received by plaintiff while in the employ of defendant, by reason of a failure of duty on the part of the latter in respect to furnishing plaintiff with a reasonably safe ladder with which to do his work.

The evidence showed, without dispute, that plaintiff had worked as a millwright in defendant's flour mill for several months before the injury; that he was a person of large experience in such work and very familiar with the use of ladders of various kinds in and about millwright work; that at the time in question he was putting up some spouts or conductors, that required him to work on a gallery on which were located purifiers in operation; that for the purpose of reaching the point where the work was to be done, he was obliged to use a short ladder; that he found one standing

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upright against one of the machines, took and immediately placed it in position, and ascended it with a spout in his hand to do his work; and that while so engaged the ladder suddenly slipped on the floor, causing him to fall and entangle one of his feet in the belt on one of the machines, by reason of which one of his legs was broken and he was otherwise injured. The alleged defect was want of spikes in the ladder to prevent its slipping on the floor.

At the close of the evidence there was a motion to direct a verdict for defendant, which was denied. The court charged the jury that the ladder was defective, as a matter of law, for want of spikes to prevent its slipping on the floor, and that if plaintiff, in the exercise of ordinary care, should have discovered such defects, he could not recover; otherwise that he was entitled to a verdict for compensation for his injuries. A verdict was rendered for plaintiff. Defendant's counsel moved the court to set the verdict aside and grant a new trial, which was denied. Judgment was thereafter entered in plaintiff's favor, and defendant appealed therefrom on exceptions duly taken.

For the appellant there was a brief by *Ross, Dwyer & Hanitch*, and oral argument by *W. D. Dwyer*.

For the respondent there was a brief by *Crownhart, Owen & Foley*, and oral argument by *W. R. Foley*.

MARSHALL, J. It is only when the evidence, and all the reasonable inferences from evidentiary facts established thereby, are one way in respect to a fact in issue, that the trial court is warranted in taking it from the jury. Testing the evidence in the record by that familiar rule, the instruction given by the trial court to the effect that the ladder was defective and the defendant guilty of actionable negligence as a matter of law, unless plaintiff was guilty of contributory negligence, was a clear invasion of the province of the jury.

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Whether a tool is defective, so as to render the person responsible for its reasonable safety for use liable for damages to an employee injured by some failure of duty in that regard, must be determined in the light of all the circumstances bearing on the question, and particularly the right of such person to rely on the duty of such employee to exercise ordinary care for his own safety. A ladder is one of the most simple contrivances in general use. The danger attending such use is a matter of almost common knowledge, and is particularly within the knowledge of men engaged in such work as that in which plaintiff was employed when injured. Under all the circumstances, in view of the very simple character of such a tool; the ease with which plaintiff could have informed himself as to whether there were points in the bottom of it; the obvious dangers which would naturally suggest to such a person the necessity of familiarizing himself with its character in that regard before using it, and to guard against its tendency to slip on the floor; and many other things that might be mentioned,— clearly, the court was not warranted in finding, as a matter of law, that the officers and agents of the defendant, whose duty it was to act in its behalf, in the exercise of ordinary care, ought reasonably to have apprehended that some person, who might use the ladder in and about defendant's work, might be injured as a natural and probable result of its condition. That is an essential test of actionable negligence. *Sheridan v. Bigelow*, 93 Wis. 426; *Deisenrieter v. Kraus-Merkel Malting Co.* 97 Wis. 279. Such test was evidently overlooked or not appreciated by the learned trial judge, else he would have at least submitted the question to the jury under proper instructions.

It is further assigned as error that the court refused to direct a verdict for defendant, and to set aside the verdict as against the evidence. There was no question in the case as to plaintiff's being an experienced workman in the use of

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ladders on floors in mills; no dispute but that he had as good an opportunity as defendant for knowing of the defects in the ladder, if any existed, and all the probable consequences that might follow; no dispute but that he might, by an instant's inspection of the ladder, have found out its exact condition; no dispute but that he selected the ladder and used it without any sufficient, or really any, inspection in regard to its being furnished with points to prevent its slipping on the floor: in that state of the case, under the well-settled rule that an employee is chargeable with knowledge of all the dangers that are apparent to such observation as men of ordinary care, under the circumstances of the situation, would be likely to make, and the duty to guard himself against injury therefrom (*Jones v. Sutherland*, 91 Wis. 587), and that if, by reason of such dangers, he is injured, he is remediless by reason of his contributory fault,— the plaintiff clearly assumed the risk of using the ladder in the condition it was. *Powell v. Ashland Iron & Steel Co.*, *ante*, p. 35.

The case of *Holt v. C., M. & St. P. R. Co.* 94 Wis. 596, seems to rule this. There an employee was injured by the slipping of a pinch bar on the rail while he was using it to move a locomotive. Such slipping occurred because the heel of the bar, where it came in contact with the rail, was too dull. The employee was experienced in the use of such tools. He knew the liability of the bar to slip if it was not kept sharp, yet he used it without first ascertaining its condition in that regard. In deciding the case, Mr. Justice NEWMAN said, in effect, that the plaintiff knew the danger of using a defective bar and by reasonable attention he could have learned of its condition in that regard; and by inattention he took upon himself the risk of the defect, and therefore could not shift the consequences onto the defendant, but must bear the misfortune himself.

It is quite clear from the evidence that plaintiff paid no attention whatever to the ladder before using it. He said

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that he tested it, but that such test was only to see that there was no flour under it. He also testified that if he had jumped the ladder down on the floor, and then tried to move it, he could have detected at once whether there were points in the bottom or not; that what he did was to set the ladder up and give it a little jerk,— simply picked it up and set it down; that he did not test it to see if there were points on the bottom; that if it were heavy he could have discovered whether there were such points by setting or striking it down on the floor. The evidence in the case is to the effect that the ladder was short and weighed but twenty-five or thirty pounds. If it was defective, as claimed, the defect was open and obvious, with the exercise of the slightest attention; if it was negligence to furnish a ladder for use in and about the mill with such defects, then it was negligence on plaintiff's part to use it without discovering a condition which was ascertainable by ordinary attention to the instrumentalities in use.

The principles applicable to this case are well established in the law of negligence, as shown by numerous authorities cited in *Holt v. C., M. & St. P. R. Co.* 94 Wis. 596. For such application to facts somewhat similar to these, *Cahill v. Hilton*, 106 N. Y. 512, cited by appellant's counsel, is a valuable precedent. As said there by Chief Justice RUGER, a ladder, like a spade or hoe, is an implement of simple structure, intelligible in all its parts to the dullest intellect. How strongly this applies to an experienced employee, required to use ladders constantly about his work, and who must be presumed to know as well as the master whether points in the bottom of such tools are essential to their safety for use, and has better facilities than the master for discovering defects in that regard, is most manifest. On the undisputed facts here, the jury, as in *Cahill v. Hilton*, *supra*, were permitted to say that defendant was guilty of actionable negligence for not furnishing a ladder free from defects

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in regard to points in the bottom, the absence of which would be quickly observed by ordinary observation and attention, yet that plaintiff, with superior means of observation and knowledge, was not guilty of contributory negligence because of his ignorance of such defects. That was a plain violation of one of the most familiar principles of the law of negligence.

In the discussion and decision of this case the rule has been kept clearly in mind that a servant is not obliged to search for defects in instrumentalities furnished for his use, but may rely on the duty of the master to see that they are reasonably safe; yet such rule does not militate at all against that other rule, just as well settled in the law of negligence, that the master may rely on the duty of the servant to observe all defects and dangers which reasonable attention to the work in hand will generally disclose to a person of ordinary intelligence and experience in such work. *Hazen v. West Superior Lumber Co.* 91 Wis. 208; *Soutar v. Minneapolis International Electric Co.* (Minn.), 70 N. W. Rep. 796; *Rietman v. Stolte*, 120 Ind. 314; *Ragon v. T., A. A. & N. M. R. Co.* 97 Mich. 265; *Holt v. C., M. & St. P. R. Co.* 94 Wis. 596.

The motion on the part of the defendant for the direction of a verdict should have been granted, and failing in that, the verdict of the jury should have been set aside and a new trial granted for errors in the instruction and because the verdict was not warranted by the evidence.

By the Court.— The judgment of the superior court is reversed, and the cause remanded for a new trial.

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PRYBILSKI, Appellant, vs. NORTHWESTERN COAL RAILWAY COMPANY, Respondent.

January 13 — February 8, 1898.

Master and servant: Injury from defective appliances: Notice of defect: Fellow-servants: Safe place to work.

1. In an action against a dock company for injuries sustained by an employee, who was struck by coal knocked from a pocket by a bucket, alleged to have been defective, which was used to hoist coal out of vessels and convey it to various parts of the yard by means of a track on a trestle, the only evidence of a defect was that the bucket failed to right and latch itself on the two preceding trips, made within fifteen minutes prior to the accident. On both such occasions the hoister had succeeded in righting the bucket by means of the levers, but on the occasion in question he had failed to do so, and, concluding that it would clear the coal in the pockets, brought it back unlatched. After this the bucket latched itself automatically on every trip for an hour and a half. *Held*, that the negligence, if any, was that of the hoister, a fellow-servant of plaintiff, and not that of the defendant, the time between the discovery of the defect and the happening of the accident being too short to charge the latter with constructive notice.
2. Failure of the employer in such case to provide a covering for the space beneath the course of the buckets is *held* not to have been negligence, where there was no evidence that such a covering was practicable and the undisputed evidence was to the effect that such coverings were not in use upon similar docks in that part of the country.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an action for personal injuries. The facts appearing on the trial were that the defendant, in November, 1895, owned and operated a large coal dock on Allouez bay, in the city of Superior, and that the plaintiff was a laborer about the dock. On the west side of the dock, and joining the bay, was a long trestlework about thirty-five feet high, and upon the top of this trestlework there was machinery for

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hoisting coal out of the vessels in the bay. This hoisting was done by means of buckets lowered down into the boats from the ends of boom sticks. The buckets were then raised out of the boat to the boom stick, and then followed the boom stick along over the trestle, on a carriageway, for a long distance back across the dock, being under the control of a man called the hoister, who was stationed on the top of the trestle in charge of the machinery, and by means of levers dumped the buckets at the proper point. The buckets were so constructed that, when dumped, they would right and latch themselves; and the hoister then, by the aid of his levers, brought the bucket back along the carriageway and the boom stick, and lowered it into the vessel. The average time occupied in loading the bucket, emptying it, and returning it to the vessel, was about four minutes. Immediately east of the trestlework, and upon the ground and floor of the dock, were two parallel railway tracks, running lengthwise of the dock; and immediately east of these tracks were pockets built up upon timbers, the top of which came within five or six feet of the carriageways upon which the buckets ran back and forth. These pockets extended the whole length of the dock north and south, and from the bottom of each pocket there was a spout which extended downwards, so that coal could be loaded from the pockets to the cars standing on the east railroad track. When the pockets were full, the buckets of coal were carried over the pockets further east, and dumped in the yard. At the time of the accident, the pocket over which one of the buckets ran was full, and the coal was heaped up above the top, and the hoister was sending the bucket back into the yard. When the bucket was empty and was properly latched, it would clear the coal which was heaped up over the top of the pocket; but if the bucket did not latch and was returned without latching, it hung down about a foot and a half lower, and in that position would hit the coal.

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On the morning in question, the plaintiff, who was a man of some experience in the coal business and had been at work about coal docks for several years, was set at work loading cars, in close proximity to the pocket above mentioned. The bucket in question had been working three hours that morning prior to the accident, taking coal from the hold of a vessel in the bay, first filling the pocket, and then dumping the coal out beyond the bin on the dock. During this time it had latched itself automatically when unloaded. A few minutes before the accident, however, upon its return trip, it failed to automatically right itself and latch; whereupon the hoister, by use of his levers, succeeded in latching it before it reached the bin. Upon the next trip the same thing happened, and again the hoister succeeded in latching it. Upon the third trip it failed to latch, and the hoister, not succeeding in latching it by the use of his levers, concluded that it would clear the coal all right, and brought it along over the bin. It hung so low, however, that it scraped two or three hundred pounds of coal off of the top of the bin, a part of which fell upon the plaintiff below, and seriously injured him. The hoister continued to use the bucket after this, and for an hour and a half it latched itself automatically. There was no other evidence tending to show that the bucket in question was defective, and the hoister testified that it was his duty to see that the bucket came back latched, but that he thought that the coal was low enough in the bin to allow it to come back unlatched.

A verdict was directed for the defendant, and the plaintiff appeals.

For the appellant there was a brief by *John Brennan* and *John Jenswold*, and oral argument by *Mr. Brennan*.

For the respondent there was a brief by *Ross, Dwyer & Hanitch*, and oral argument by *W. D. Dwyer*.

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WINSLOW, J. It is claimed that the evidence tended to show negligence on the part of the defendant in two particulars, namely: (1) In failing to furnish a safe place to work, by not providing a covering over the railroad tracks and beneath the course of the coal buckets, which would prevent coal from falling upon employees who were working below; and (2) in using a defective bucket, which would not automatically right itself when empty.

1. As to the first ground of negligence, there is an entire absence of evidence to show that such a covering was practicable or in use upon similar docks at the time of the accident. On the other hand, the testimony was undisputed that such a covering was never in use upon similar docks either at Superior or at other lake ports. The duty of the defendant was to furnish a place as safe and free from danger as other persons of ordinary care, prudence, and caution, engaged in like business and in like circumstances, ordinarily furnish. *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 482. The evidence shows that this was done in the present case.

2. As to the alleged defective bucket, there is no evidence tending to show that it was defective, save the fact that it failed to right itself and latch automatically on the two trips just prior to the trip in question. This was within fifteen minutes prior to the accident, and on both occasions the hoister succeeded in righting it by the use of his levers. He tried to so right it on the third trip, but, failing in his first endeavor, concluded it would clear the coal, and brought it back unlatched. After this the bucket latched itself automatically on every trip for an hour and a half. If this in fact shows any defect in the bucket at all, it affirmatively shows that neither the defendant nor its officers had any knowledge of such defect, nor any opportunity to know of it. The time was manifestly too short to charge them with

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constructive notice. If there was negligence at all, it was on the part of the hoister, who was a fellow-servant of the plaintiff.

By the Court.— Judgment affirmed.

CONGER, Respondent, vs. DINGMAN, Appellant.

January 17 — February 8, 1898.

Appeal: Printed briefs: Reversal: Evidence.

1 In a case where the evidence extends over a hundred printed pages, a brief in which no specific assignment of errors is made and no specific error of fact is pointed out or relied on, except the general contention that the judgment should have been given in favor of the appellant, is criticised for failure to comply with Supreme Court Rule IX.

2. The fact that different minds might well arrive at opposite conclusions upon a consideration of the evidence is not a ground for disturbing findings of the trial court which are well sustained by competent evidence.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Smith & Pierce*, and for the respondent on that of *E. D. McGowan.*

PINNEY, J. This was an action by the plaintiff to recover from the defendant for his services in assisting him in negotiating and completing a sale of the defendant's farm, for which the plaintiff claims it was agreed that he was to have all that the farm sold for in excess of $68 per acre, and it was claimed that it sold for $70 per acre, whereby the defendant became indebted to him for such services in the sum of $140, of which $15 had been paid. The answer was a general denial.

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Upon a trial in the municipal court for Rock county, judgment was given in favor of the defendant, from which the plaintiff appealed to the circuit court, where the case was heard upon the evidence returned to that court, which had been taken by a shorthand writer at the trial. Upon hearing the appeal, the circuit court reversed the judgment of the municipal court, and gave judgment in favor of the plaintiff for $111.16 and costs, from which the defendant appealed to this court.

There is no question of law involved, and the only question is a question of fact, depending almost entirely upon the credibility of the parties as witnesses in their own behalf. The evidence extends over a hundred printed pages, and there was no assignment of errors, and no specific error of fact is pointed out or relied on, except the general contention that judgment should have been given in favor of the defendant. We have had frequent occasion to criticise the failure of counsel in the preparation of briefs to comply with the requirements of rule IX, which was designed to facilitate the examination of cases, and we feel that it is due to the court to say that hereafter the rule will be strictly enforced. The rule requires each party to prepare and print a brief, "and each statement and proposition therein, which is based upon the record, must refer to the page of the record as contained in the printed case upon which the same is based." The brief of the appellant must contain a concise statement "of the errors relied upon for reversal," and, in "cases depending upon the evidence, the leading facts or conclusions which the evidence establishes or tends to prove." The brief of the appellant is quite faulty in these respects, leaving the court to glean from a hundred pages of printed evidence the matters which the rule requires should be succinctly and clearly pointed out. Particularly applicable to cases such as the present is the provision of the rule that "no extended discussion upon *a*

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mere question of fact will be permissible in any brief or at the bar, but the brief must refer to the printed case where all evidence bearing upon such leading facts or conclusions may be found."

It cannot, we think, be fairly affirmed that there is any preponderance of evidence, much less a decided one, against the conclusion at which the circuit court arrived. On the contrary, it seems to be well sustained by competent evidence, and while different minds might well arrive at opposite conclusions upon a consideration of the evidence, as appears to have been the case with the municipal and the circuit judge, this does not furnish any ground for reversal of the judgment appealed from. In view of the evidence, we cannot affirm that the conclusion reached by the circuit court is erroneous. We do not think it material or profitable to enter upon a discussion of the evidence. These considerations necessarily lead to an affirmance of the judgment.

By the Court.— The judgment of the circuit court is affirmed.

BRODERICK, Respondent, vs. CARY, Appellant.

January 17 — February 8, 1898.

Equity: Quieting title: Pleading.

1. In an action to remove a cloud from, or to quiet, title to real estate under the laws of this state, the provision of sec. 3186, R. S. 1878, to the effect that it shall be sufficient as to the hostile title or interest to aver in the complaint that the defendant makes some claim to the property is satisfied by alleging facts from which the hostile claim of title or interest is raised as a necessary or reasonable inference.
2. Allegations to the effect that the property was levied upon and sold on an execution issued on a judgment against a stranger to the title; that certificates of sale in due form of law were issued, de-

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livered, and filed, pursuant to such sale, according to the statutes in such cases; and that such certificates are still outstanding and of record, sufficiently show the hostile claim of title, and satisfy the requirement of the statute.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

The allegations of the complaint are, in substance:

(1) That plaintiff, at the time of the commencement of the action, was, and since December 17, 1894, has been, the owner in fee simple and in the actual possession of certain real estate described, situated in Rock county, Wisconsin;

(2) That June 22, 1896, the sheriff of said county, under an execution issued out of the circuit court thereof on a judgment rendered May 9, 1896, in favor of defendant and against M. H. Broderick, pursuant to a levy and due advertisement under such execution, sold said real estate for the sum of $500, to satisfy such execution;

(3) That such levy and sale were made by direction of the defendants on the theory that such real estate was the property of said M. H. Broderick;

(4) That the sale was completed by the execution, filing, and delivery of proper certificates of sale, as required by law;

(5) That such certificates of sale constitute a cloud on plaintiff's title, and will, unless removed, compel him to redeem therefrom in order to prevent the creation of a further cloud on such title by the issuing of a sheriff's deed to defendant or her assigns, purporting to convey to her said lands pursuant to such certificates.

The prayer of the complaint is, in effect, that plaintiff's title be quieted; that the cloud thereon, created by the certificate of sale on file, be removed; and that defendant be enjoined from selling or disposing of the certificate of sale, or procuring a sheriff's deed thereon.

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The defendant interposed a general demurrer to the complaint, which was overruled, and defendant appealed.

For the appellant there were briefs by *Dunwiddie & Wheeler*, and oral argument by *B. F. Dunwiddie*. They argued, among other things, that if the invalidity of that which is alleged as a cloud appears on the face of the record by which it is shown to exist, equity will not interfere. *Gamble v. Loop*, 14 Wis. 465; *Meloy v. Dougherty*, 16 id. 269; *Truesdell v. Rhodes*, 26 id. 216; *Moore v. Cord*, 14 id. 216; *Pier v. Fond du Lac*, 38 id. 470; *Cornish v. Frees*, 74 id. 490; *Brown v. Cohn*, 88 id. 627; *S. L. Sheldon Co. v. Mayers*, 81 id. 623. The complaint was framed under the general equity powers of the court to remove cloud on title, and not under the statute (sec. 3186, R. S. 1878). Having brought his action in that form he cannot now sustain his complaint under said section, even if the allegations show that he might bring an action under it. *Walton v. Perkins*, 28 Minn. 413; *Knudson v. Curley*, 30 id. 433; *Stuart v. Lowry*, 49 id. 91.

For the respondent there was a brief by *Richmond & Smith*, and oral argument by *T. C. Richmond*.

MARSHALL, J. It is claimed by the appellant that the complaint does not state a good cause of action, within the general equity powers of courts in actions *quia timet*, in that the invalidity of the alleged hostile claim appears by the record, hence it does not constitute a cloud on the plaintiff's title. For the purposes of this case that may be conceded. *Moore v. Cord*, 14 Wis. 213; *Pier v. Fond du Lac*, 38 Wis. 470. But sec. 3186, R. S. 1878, as amended by ch. 88, Laws of 1893, has so enlarged the equity powers of the court as to give a remedy to any person having the legal title to lands against any other person setting up a claim thereto, to test the validity of such claim, and provides that it shall be sufficient to aver in the complaint the nature and extent of the plaintiff's estate in the land, describing it as accurately

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as may be; that the plaintiff is in possession thereof, or that it is vacant and unoccupied; and that the defendant makes some claim thereto; and to demand judgment that the plaintiff's claim be established against any claim of the defendant, and that he be forever barred against having or claiming any right or title in the land adverse to the plaintiff. The statute has extended the right of action so that it may be resorted to by any person having either title to, or a lien or incumbrance on, land, whether in or out of possession, against any person making a claim hostile to such title, lien, or incumbrance. Whether the hostile claim be apparently valid on its face or the record, so as to constitute a cloud on the title strictly so called, according to adjudications under the old action *quia timet*, is immaterial. *Fox v. Williams*, 92 Wis. 320.

It is claimed by the appellant, however, that the complaint does not state a cause of action because of a failure to allege, in the words of the statute, that the defendant makes some claim to the land. Manifestly, the statute does not require such an allegation. It merely provides that as to the adverse claim it shall be sufficient to so allege. Clearly, if the facts constituting the adverse claim are alleged, it satisfies the statute. It is expressly provided that, in order to establish the fact that the defendant is setting up or making some claim to the land, 'it shall be sufficient to introduce in evidence any instrument in writing, theretofore at any time appearing of record, or the record thereof, or a duly-certified copy of such record, purporting to convey to, or otherwise affect in favor of, the defendant, the title to the land adversely to the plaintiff, or under or through which the plaintiff does not trace his claim or title.' It would seem to follow, necessarily, that allegations which, if true, show the existence of a hostile claim of title, cannot be added to by alleging, as a conclusion, that the defendant is making such hostile claim. That proof of a sale of land on execution, on a judgment

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against a person having no interest in such land at the time of the rendition of such judgment or subsequent thereto, establishes a claim of title to the land adverse to the true owner, within the meaning of the statute, was expressly ruled in *Maxon v. Ayers*, 28 Wis. 612, which case seems to touch this unfavorably to the appellant at every point. Said Mr. Justice COLE there, in effect, the placing of a certificate of sale of land on file under such circumstances is the setting up of a claim of title to such land in the most unequivocal manner, and is directly calculated to throw doubt on the title of the true owner; besides, the danger that a deed may be issued upon the certificate, unless canceled, capable of being used as a means of vexatious litigation, which will prevent the sale of the property at its full value, is manifest. The sufficiency of the complaint was there under discussion. The issue turned wholly on whether the statement of facts in reference to the levy upon the land, sale, issuance and filing of the certificate of sale, and its existence of record and outstanding, constituted a setting up of a claim of title to the land within the meaning of the statute. True, the allegations as to the existence of the certificate, and the facts leading up to it and showing that the sale did not in fact affect the plaintiff's title, were followed by a general allegation that by means thereof the defendant was setting up a claim to the land; but it was considered that such general allegation did not add to the facts pleaded, on which it was based, as a mere conclusion, and that such facts clearly showed that defendant was making some claim to the real estate of the plaintiff as contemplated by the statute.

By the Court.— The order of the circuit court overruling the demurrer to the complaint is affirmed.

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COOPER, Appellant, vs. THE VILLAGE OF WATERLOO, Respondent.

January 17 — February 8, 1898.

Municipal corporations: Snow and ice on sidewalk: Injury to traveler: Court and jury.

Plaintiff, in passing over a portion of a sidewalk in the defendant village which inclined twelve or fourteen inches in six feet, fell and was injured. It appeared that four slats had been nailed across said incline about fourteen inches apart, but that they had been covered up by snow which had accumulated on the walk; that sleet or mist during the night preceding, or early on the morning of, the accident, followed by a slight flurry of snow, had rendered the walk very slippery, but that it had not previously been in that condition; that ashes had been sprinkled on the walk before, but none had been sprinkled after, such slippery condition arose; that the accident happened about 9 o'clock in the morning; and that plaintiff had passed over the place in question a short time previous thereto, going in the opposite direction, and knew the slippery condition of the walk. *Held*, as matter of law, that no defect in the sidewalk was shown which would render the village liable for plaintiff's injury.

APPEAL from a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Bushnell, Rogers & Hall*, and oral argument by *A. R. Bushnell.*

For the respondent there was a brief by *Geo. W. & H. S. Bird* and *H. T. Ames*, and oral argument by *Mr. Geo. W. Bird* and *Mr. Ames.*

CASSODAY, C. J. This action was brought to recover damages for personal injuries sustained January 17, 1893, by reason of an alleged defective sidewalk. The answer consists of admissions, denials, and counter allegations, including contributory negligence on the part of the plaintiff. At the close of the trial, the court directed the jury to return a

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verdict in favor of the defendant. From the judgment entered upon the verdict so returned, the plaintiff appeals.

It appears that at the time of the accident the defendant was a village of about 1,100 inhabitants; that the street in question was one of the principal streets in the village; that the only alleged defect in the structure of the sidewalk is that, at the place where the accident happened, an apron led from the higher part of the walk down to the lower part of the walk; that this apron was made of planks running lengthwise of the walk, and was six feet wide and six feet long; that the upper end of the apron was from twelve to fourteen inches higher than the lower end, so that the descent in the apron for the six feet was about two inches to the foot; that across this apron were four slats or cleats nailed to the planks constituting the apron, and these slats appear to have been about fourteen inches apart, the lower one being about that distance from the foot of the apron; that such depression in the walk only extended the width of a store; that immediately west of the store was a somewhat corresponding apron, descending the other way; that such depression in the walk had been caused by the street being raised in front of the store, and that the walk had been correspondingly raised east and west of the store, but not in front of the store; that there was no perceptible lateral descent in the apron described; that the plaintiff, who was forty-one years of age, lived upon the same side of this street, a few doors west of the store; that a little before 8 o'clock on the morning of January 17, 1893, she started from her house to go to a wedding at the church, and, in going, passed right over and up this apron without difficulty; that she then noticed that there was ice on the apron, and that it was slippery, smooth, not rough nor uneven, and that there had been a very little sprinkle of snow the evening before; that she returned from the church a little before 9 o'clock in the forenoon; that, when she came to the apron, she was

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looking right at it, and saw its condition and the slight flurry of snow on it; that the slats were covered with ice; that, when she was about the middle of the apron, both of her feet slipped at the same time, and she fell and was injured.

The structure of the sidewalk at the place of the accident seems to have been reasonably safe at the time. It would be very unreasonable to require villages or cities to maintain perfectly even walks. The only question as to the alleged defect in the walk worthy of any consideration in this case is as to whether the ice had been allowed to accumulate on the apron to such an extent and for such length of time as to make it a question for the jury whether it was at the time unsafe or reasonably safe. Upon that question, as well as the plaintiff's contributory negligence, the learned trial judge has summarized the facts as favorably to the plaintiff as the evidence will bear, in substance as follows:

The facts in the case are absolutely undisputed. The only question in dispute was whether it was fourteen inches or twelve inches high. If there is any other, I do not know it. Many witnesses have testified that there was mist that night, that made it slippery that night and early on the morning in question; not only slippery, but very slippery, so much so that many intelligent and careful men avoided the sidewalk and walked in the center of the street. It does appear that these slats were filled up, and that the ice and snow upon them prior to this evening was from an inch, perhaps, to an inch and a half thick, and concealed or covered up those ridges made by the slats. But it does not appear, and no witness has testified, that the walk was so very slippery until this morning. And the evidence shows that ashes were sprinkled on the walk before, but that none had been sprinkled on after, this exceedingly slippery condition was caused by the freezing of the sleet and mist the night before. If the defendant were liable at all, it would be not so much because it was slippery, but because it had not put

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the ashes on to stop its being slippery in the morning. One witness says that he was going home about 11 o'clock the evening before; that it was not very slippery then; and almost every one of the witnesses say that the roads and the sidewalks were not very slippery the day before, and all agree, including the plaintiff's witnesses, that it was exceedingly slippery at this time in the morning, and that it had been rendered so during the night. It would be holding too strict a rule to say that municipalities must put ashes on all the sidewalks in the city before 8 or 9 o'clock in the morning. The plaintiff had passed over this apron in safety going the other way, up the slant instead of down the slant; and she says she was looking right at that walk, and saw and knew that it was very slippery. I am impressed with the idea that the plaintiff is not entitled to recover in this case. To say that a person walking on an inclined plane on a slippery place, that is only caused the night before, when such person knows exactly what it is, and when there is a possibility for them to avoid it by going in the center of the street, could recover, would be going further than the law permits.

For such reasons the trial court directed a verdict in favor of the defendant, and we are all clearly of the opinion that the verdict was properly so directed. Certainly, there was a failure to show any such defect in the walk as to take the case to the jury. The adjudications of this court upon such questions are too numerous and too familiar to the profession to require citation. Among the more recent decisions in this court we cite *Salzer v. Milwaukee*, 97 Wis. 471; *Beaton v. Milwaukee*, 97 Wis. 416.

By the Court.—The judgment of the circuit court is affirmed.

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ZILLEY, Respondent, vs. DUNWIDDIE, Guardian *ad litem*, Appellant.

January 17 — February 8, 1898.

Parent and child: Liability of father for support of child furnished by mother after divorce: Implied promise.

A decree of divorce, granted for cruel and inhuman treatment of the wife by the husband, awarded the care and custody of the children to the wife until the youngest became ten years of age, but made no provision for their support. When the youngest child reached that age the father applied to the mother to have the child come to live with him, but the mother refused to let him go, and the father thereupon told her that he would not pay for his keeping. Thereafter the father made frequent efforts to get the child to live with him, but the mother would not consent, and the child continued to reside with his mother until a short time before the death of his father, at which time the latter sent him away to school, where he remained until after his father's death. *Held*, that a promise on the part of the father to compensate the mother for her necessary expenses in maintaining the child after the father became entitled to his care and custody, would be implied from his acquiescence in such maintenance by her and his failure to compel the child to live with him. MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

This is an appeal from the judgment of the circuit court for Rock county allowing the claim of *Mary A. Zilley*, the respondent, against the estate of her former husband, August Zilley, deceased.

The parties were married September 26, 1867, and divorced, by a decree of the circuit court for Rock county, December 29, 1884, in an action brought by the claimant against said August Zilley, on the ground of his cruel and inhuman treatment. The court by its decree made a final division of the estate of said August Zilley between him and the said *Mary A. Zilley*. The parties had an understanding with each

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other previous to the divorce in regard to the custody and education of the two children of the marriage, namely, William A. Zilley, at that time about sixteen years of age, and *Clayton A. Zilley*, about five years of age, to the effect that the mother, the present claimant, should have the custody and education of the boy William A. Zilley, and also of the youngest child, *Clayton A. Zilley*, until he should become of the age of ten years, after which his father was to have him. The court accordingly decreed the custody of said children to the mother "until the youngest of said children should become of the age of ten years, or until the further order of the court," the defendant in the meantime having the right to visit such children at reasonable times, in the daytime. No provision whatever was made in the decree as to the maintenance and support of either of the children.

About two or three years subsequent to the divorce the deceased was married to Martha Zilley, who survives him. The deceased, August Zilley, then resided in the city of Beloit, where he continued to reside after the divorce and for some two or three years after his second marriage. He then moved onto his farm, near said city, and continued to reside there until the time of his death, March 7, 1895. The youngest child became ten years of age July 9, 1889, when the deceased, August Zilley, applied to the claimant for the boy to go and live with him, and she refused to allow him to go; whereupon he told her that if the child could not come and stay with him he would not pay for his keeping, that he was willing to pay his schooling, and give him a home with him, which was where he belonged, as he understood it. A room was fixed up for him in the home where Mr. Zilley then resided, and subsequently Zilley tried frequently to get the boy to live with him, but claimant would not consent. He continued to make his home with the claimant down to the 13th of January, 1895, when his father sent him to Faribault, Minnesota, to school, where he remained until after the death of the latter.

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It was found by the circuit court, among other things, that no allowance for or provision respecting the expense of the education and support of said children was made by the judgment, and no application to the court in respect thereto or in respect to the custody of said children was made by either party after judgment. The youngest child, *Clayton A. Zilley*, became ten years old July 9, 1889, and had at all times since the divorce resided with his mother, the claimant, excepting short periods of time, since he attained the age of ten years, not exceeding in the aggregate six months. He was attending school at Faribault, Minnesota, the greater portion of the time when not so residing with his mother, and during the residue of such time he was with his father, August Zilley, and his second wife, upon said farm. He visited and resided with his father for a few days at a time on several occasions after he became ten years of age, but preferred to reside with his mother, and returned to her on each such occasion, and made his permanent residence with her of choice, because his father was unwilling to compel, or did not compel, him to reside with him. Between July 9, 1889, and March 7, 1895, the date of the death of August Zilley, the claimant furnished said *Clayton A. Zilley* his board and lodging, and cared for him for and during five years and two months at her sole cost and expense, which board, lodging, and care were reasonably worth $1,072; and after said 9th day of July, 1889, and prior to March 7, 1895, said claimant furnished to said *Clayton A. Zilley* necessary clothing, at the cost to her of $146.50; and nothing had been paid to or received by her from any one for or on account of such board, lodging, and care, or for such clothing. The claimant filed a claim against the estate of said August Zilley, deceased, in the county court of Rock county, for such board, lodging, care, and clothing, for the sum of $1,444, and the county court, by its judgment, wholly disallowed said claim, and the claimant appealed therefrom to the circuit court.

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The foregoing facts were found by the circuit court, and that the executor of the last will and testament, George H. Crosby, had in his hands assets, properly applicable thereto, more than sufficient to pay the said claim. There was evidence that the deceased, August Zilley, desired the boy *Clayton* to live with him, and on one occasion sent for the boy, and the claimant said that he did not have to go if he did not want to. In answer to the question why she kept the boy, she testified that the boy stayed there, and "I felt under obligations to have him stay." It appeared that the father was able and willing to properly provide for the boy, and desired that he should live with him. The circuit court reversed the judgment of the county court, and allowed said claim at the sum of $1,218.50, and adjudged that it be paid to the said claimant by said executor, with the costs of the action.

The guardian *ad litem* of the two minor children of the said deceased, to wit, said *Clayton A. Zilley* and *Edna Zilley*, a daughter by his second wife, appealed.

B. F. Dunwiddie, guardian *ad litem*, contended, *inter alia*, that a divorced wife and mother cannot recover from the estate of her husband, on the settlement thereof in the county court, for support and maintenance furnished voluntarily by her to her own child, where, under the decree of divorce, the father is entitled to the custody of the child, and has been at all times desirous, ready, and able to give the child a home and provide for its support, but is prevented therefrom by the influence and refusal of the mother. *Ramsey v. Ramsey*, 121 Ind. 215; *Rich v. Rich*, 88 Hun, 566; *Burritt v. Burritt*, 29 Barb. 124; *Cushman v. Hassler*, 82 Iowa, 295; *Hampton v. Allee*, 56 Kan. 461; *Harris v. Harris*, 5 id. 46; *Hall v. Green*, 87 Me. 122; *Brown v. Smith*, 19 R. I. 319; *Chester v. Chester*, 17 Mo. App. 657; *Gotts v. Clark*, 78 Ill. 229; *Finch v. Finch*, 22 Conn. 412; *Chandler v. Dye*, 37 Kan. 765; *Fulton v. Fulton*, 52 Ohio St. 229. The power

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given the circuit court by sec. 2363, R. S. 1878, to modify the judgment in the divorce action deprives other courts of any jurisdiction over the care, custody, maintenance, or education of the children. Under the divorce decree they became the wards of the circuit court, and all applications affecting their custody or maintenance must be made to that court in the divorce action. The claimant could not have maintained an action in any court against Mr. Zilley for the support and maintenance of the boy, *Clayton*, intermediate the decree and the death of Mr. Zilley. She was limited to her application under the section cited. *Ramsey v. Ramsey*, 121 Ind. 215; *Hoffman v. Hoffman*, 15 Ohio St. 427; *Williams v. Williams*, 13 Ind. 523; *McNees v. McNees*, 97 Ky. 153; *Brow v. Brightman*, 136 Mass. 187; *Stetson v. Stetson*, 80 Me. 483; *Sullivan v. Learned*, 49 Ind. 252; *Shaw v. McHenry*, 52 Iowa, 182; *Leming v. Sale*, 128 Ind. 317; *Jennings v. Jennings*, 56 Iowa, 288; *Bennett v. Southard*, 35 Cal. 688.

For the respondent there was a brief by *Ruger, Norcross & Ruger*, and oral argument by *William Ruger*.

PINNEY, J. At the common law the husband was primarily liable for the support of his minor children. 2 Kent, Comm. 190. In *McGoon v. Irvin*, 1 Pin. 532, it was said that "by every principle of law upon the subject, recognized and strengthened by our statute, parents are under legal obligation to maintain and support their children who are of tender years and helpless." The statute (R. S. 1878, sec. 1503) makes the father primarily liable to support his minor children. When the marriage is dissolved by divorce, the duty of parents to maintain their children remains as before, for children are not parties to the divorce suit and do not lose any rights thereby. Hence the father's duty to maintain them after the divorce, where there is no decree of the court relating thereto, especially if their custody is not

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taken from him, remains as before. After the parents were divorced all duties and obligations to each other ceased, and they became as strangers to each other. Nelson, Div. & Sep. § 981. The claimant owed the husband no duty as wife, and her duty to support the child continued, as before, secondary, and his primary. 2 Bishop, Mar., Div. & Sep. § 1210; *Plaster v. Plaster*, 47 Ill. 292. It is generally laid down that the liability of the husband to a divorced wife, in respect to the support of the children, is the same as to any other third person, except as provided in the decree. If the court makes no order either for custody or support of children of the marriage, the divorce leaves the father's liability as at common law, and the mere divorce does not terminate his liability. 2 Bishop, Mar., Div. & Sep. § 1220; *Thomas v. Thomas*, 41 Wis. 233. In a proper case, it seems, after the marriage is dissolved, he may be answerable to the mother for maintenance rendered the children while living with her. *Stanton v. Willson*, 3 Day, 37; *Buckminster v. Buckminster*, 38 Vt. 248. The father is under legal obligation to provide for the support of his children, even if they remain with their mother after her divorce, and, as against the public and the children, he cannot escape the duty. *Courtright v. Courtright*, 40 Mich. 633. Where the decree has granted the custody of the children to the wife and contains no provision for their support, it has been held that the father is not liable for the support of the children. But this is upon the ground that, the statute having made it the duty of the court to provide for their custody and maintenance upon divorce, it will be presumed that the decree has made all the provisions on that subject that were necessary; that the decree is conclusive as to the respective rights and obligations of the parties, subject to the right to have it modified as subsequent exigencies may require. As the decree makes the parties strangers as to each other, it is generally considered that a divorced husband is not liable

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to his divorced wife for necessaries furnished a child of the marriage in her custody unless by agreement, express or implied; that there must be either an express promise, or facts from which one can reasonably be inferred. *Ramsey v. Ramsey*, 121 Ind. 215; *Cushman v. Hassler*, 82 Iowa, 295. And it has been considered that the support of the child, under such circumstances, by the mother, was but the voluntary performance of a natural duty, and that her remedy was to apply to the court for maintenance of the child when the divorce was granted. These, and other cases of a similar purport, are confidently relied on as decisive against the claimant.

In *McGoon v. Irvin*, 1 Pin. 532, where the husband had procured a legislative divorce from his wife, and had left the minor children of the marriage in a family of a third person to be supported, the mother afterwards obtained the custody of the children without his knowledge and consent, and refused, on demand made in behalf of the father, to give them up. She afterwards intermarried with I., and the children were supported and educated by him. In an action by I. against the father to recover for their support, it was held that McG. had a legal right to the custody of the children, but, as he had not attempted to assert it against I., the law would presume that McG. had assented to their being in the control and custody of I.'s wife, their mother, and that I. could recover, though the act of the mother in obtaining the custody of the children before her second marriage might have been wrongful. And it was said by the court that "when a parent permits a stranger to maintain, support, and instruct such children, in no way objecting to the act, but rather assenting and advising therein, the law will presume that he knows his obligations, accepts the services, and assumes to pay." It was also said that "there was no duty or obligation on the plaintiff to notify the defendant to take the children away, or leave them to suffer until he could see

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the defendant and make an *express* contract about their support and maintenance. Such a course would have merited the reprobation of every humane and upright man. The defendant had the legal right to the possession, and could have enforced it at any time. He should have first moved in the matter, and, on failure to do so, the law would presume that possession elsewhere was with his approbation and consent." In the leading case which holds the father liable, under circumstances like the present, the court approves the doctrine that, if a minor is forced out into the world by the cruelty or improper conduct of the father, necessaries may be supplied, and the value thereof may be recovered from the parent. "There is evidently no satisfactory reason," said the court, "for changing the rule of liability, when, through ill treatment or other breach of marital obligation, the husband renders it necessary for a court of justice to divorce the wife and commit to her the custody of her minor children. If, under such circumstances, upon the allowance of alimony with custody of children, the court omits to make an order for the children's maintenance, the father's natural obligation to support them is of none the less force. The duty of support is not evaded by the husband so conducting himself as to render it necessary to dissolve the bonds of matrimony and give to the mother the care and custody of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties, or to enable the father to convert his own misconduct into a shield against parental liability." But, obviously, this reasoning can only apply where the husband is at fault and the decree is silent as to his liability. *Pretzinger v. Pretzinger*, 45 Ohio St. 458, approved in Bishop, Mar., Div. & Sep. § 1223, and in *Fulton v. Fulton*, 52 Ohio St. 229.

It is to be borne in mind that the divorce in the instant

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case was granted to the claimant against her husband, August Zilley, on the ground of his cruel and inhuman treatment. It was his marital wrongdoing which led to the separation of the parties and the award of the custody of the boy, *Clayton*, to the mother until he became of the age of ten years. The case as to the subsequent support of the boy, *Clayton A.*, may well be placed upon the ground that the improper conduct of the father had deprived the boy of his rightful and legitimate home, and so gave the right to the mother to supply the necessary support and maintenance, and that the father should be held liable as upon an implied contract, his primary liability still remaining in full force. It is said that the father is released from obligation to maintain his infant children when deprived of their society and services against his will. In *Pretzinger v. Pretzinger, supra*, it is answered: "If voluntary misconduct on his own part leads to the deprivation, he is himself responsible, and not the court which intervenes for the protection of his children; and if the father, as against a stranger, cannot escape liability for necessaries furnished to his minor children, though remaining with their mother after the divorce, the mother will not be barred of an action against her former husband for the expense of maintaining them. After a dissolution of the marriage relation by divorce, the parties are henceforth single persons, to all intents and purposes. All marital duties and obligations to each other are at an end, and they become as strangers to each other. Upon the establishment of such new relations, a promise may be implied on the part of the father to pay the mother, as well as a third person, who has supplied the necessary wants of his infant child."

The case of *Holt v. Holt*, 42 Ark. 495, was one where there had been a decree of divorce giving the custody of infant children to the mother, and it was held that this would not relieve the father from his obligation to support them,—that he was bound to maintain them as long as they were

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too young to earn their own livelihood; and a court of chancery would, at a subsequent term, entertain the petition of the mother to recover from him her reasonable and proper advances for their support *since the divorce*, and for an order for their *future* support. The case of *Stanton v. Willson*, 3 Day, 37, already cited, was relied on,—"a decision," says ELLSWORTH, J., in *Finch v. Finch*, 22 Conn. 421, "well considered, by a court of distinguished and unsurpassed ability, and which, as far as my knowledge extends, has ever been satisfactory to the judges and the profession, and sustained by principles as old as the common law itself."

It was the right, and the duty as well, of the husband to obtain the custody and control of his infant son, and to support him, after he had arrived at the age of ten years. We consider it against the policy of the law to encourage a father thus obligated to attempt to ignore or evade his parental duty, or to cast it upon any other party, so as to enable him to convert such parental neglect and misconduct into a shield against parental liability. Domestic and social duty alike required him, when his son arrived at the age of ten years, to enforce his parental rights and discharge his parental duties. He knew they were being exercised and performed by another, who as to him was then an utter stranger, and he knew, also, that the disrupted condition of his family relations had been adjudged in consequence of his marital misconduct. We think the case of *Pretzinger v. Pretzinger*, 45 Ohio St. 458, and other similar cases, indicate the true rule, and that they are in accordance with sound principles of public policy. We think there is ample ground from which the acquiescence and assent of the husband may be justly inferred to the provision made by the claimant for the necessary support and maintenance of his son, and which he had failed to furnish for him, so that a promise on his part to compensate the claimant for what she had so expended may be justly implied, as in the case of *McGoon v.*

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Irvin, 1 Pin. 532. The cases bearing upon the subject are not, it must be admitted, in entire accord, but they have turned largely upon questions of public policy in the states where they have been decided.

We hold, therefore, for the reasons stated, that the recovery in favor of the claimant is correct, and should be affirmed.

By the Court.— The judgment of the circuit court is affirmed, with costs against the said appellant to be paid out of the estate of August Zilley, deceased.

MARSHALL, J. (dissenting). The question presented and decided in this case, stated plainly, is as follows: Where husband and wife are divorced and the custody of their minor child is left with the mother till it arrives at the age of ten years, and the legal custody then passes to the father by operation of law, if, when the latter period arrives, he does all thereafter that parental affection can suggest to induce the child to live with him, stopping short only of using force or legal authority to accomplish that result, yet the child, through stronger natural attachment for the mother, or induced by her, or from both causes combined, shall remain with the mother by her consent, and she makes no claim to compensation in advance for supporting the child or during the time of such support, and knows that the father desires to control, educate, and maintain the child in his own way, can the mother maintain an action against the father for her services in maintaining such child during the time the legal custody was in the latter?

My brethren have answered this question in the affirmative. The grounds upon which the decision is placed, I am not able to discern with certainty. Allusions are made to the moral and legal duty of a father to maintain his child, with which all concur, but obviously that mere duty is one enforceable only by the public. In an action by a private

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individual such duty is only a circumstance to be considered in determining whether contractual relations, express or implied, exist between the parties. Many cases are cited by my brethren where there was an application for support of a child, made in a divorce action, granted, and sustained on appeal, on the ground of parental duty, but such is not this action. The citations do not touch the question here. Nevertheless, in substantially all of the well-considered cases cited, it is held that compensation in such instances can go only for future, not for past, support. *Thomas v. Thomas*, 41 Wis. 229; *Courtright v. Courtright*, 40 Mich. 633; *Ramsey v. Ramsey*, 121 Ind. 215. Cases are cited to the effect that a cause of action accrues to the person who furnishes support to a child where the father omits to do so, merely because of the moral and legal duty of the parent and a failure on his part to compel the child's obedience to his authority. That appears to be the theory my brethren have adopted. The precedents for that are instances where courts have seemingly lost sight of the distinction between duty to the child which the public may enforce, and duty as evidence of a contract that a private party, privy thereto, may enforce by personal action at law. Man's humanity for children and melting tenderness for their welfare, one of the most admired and admirable sides of human character, has apparently operated, at times, to swing even courts away from that safe anchorage in the law, that personal obligations, enforceable by personal actions *inter partes*, rest solely on contract. That principle, rigidly adhered to, is the best protection of us all. Any departure from it for any cause is fraught with danger.

I am warranted in believing that the decision here, as stated, is based on the natural and legal obligation to support the child, not on contract, because the most prominent authorities cited and quoted from by my brethren in support of the decision are instances, in my judgment, that

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come within the observation made at the close of the last paragraph, as evidenced by the subsequent history of the question under discussion in the courts where such decisions were rendered. The first is *Pretzinger v. Pretzinger*, 45 Ohio St. 459. There the divorce was granted on application of the wife for fault of the husband. The custody of the child was awarded to the mother without provision for its support. Subsequently the divorced wife brought suit against the father to recover for the support of the child, and her action was sustained solely upon the ground that the obligation of the father was primary, continuous, and absolute, and not affected by divorce. The same reasoning was indulged in as that leading up to the decision here. It was decided in 1887. In 1895, in *Fulton v. Fulton*, 52 Ohio St. 229, the same question was again presented, except the divorce was granted for fault of the wife. It was held that there could be no recovery in the absence of an obligation growing out *of a contract, express or implied.* The court said, in effect, that while the relations of the parties to the child were not changed, their relations and obligations to each other were the same as that of strangers, and that no recovery could be had without showing a request from the father to support the child, or a promise to pay for such support; that the circumstance of the child's staying with its mother was so explained by the natural relations existing between them as not to leave any room for implication that there was a contract relation between the father and the mother in respect to the support of the child. True, the court instead of directly overruling *Pretzinger v. Pretzinger, supra*, distinguished the two cases by saying that the divorce in the former was for fault of the husband, in the latter for fault of the wife; but that was manifestly an explanation that entirely failed to explain. The right to recover, so far as it could be sustained on moral and legal duty, did not change in any respect by the circumstance that the divorce was

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granted for the fault of the wife. In both cases the divorced husband and wife were strangers to each other. The learned and very able court would have made a more orderly retreat from its early position by saying that it was based upon a wrong principle, for the two cases are manifestly inconsistent, and the result of trying to harmonize them presents the appearance ordinarily observed where the effort is made to preserve consistency by trying to harmonize things that are diametrically opposed to each other.

Again, in *Stanton v. Willson*, 3 Day (Conn.), 37, decided in 1808, that court held that the divorced wife could recover of her former husband for the support of the child because of the fact that prior to the divorce he abandoned it and his conduct compelled the court to place its custody with the mother as its guardian; that by reason of the facts she could contract debts for the support of the child after the divorce, while she had the legal custody of it without any provision for its support, without consent of the father, upon the principle that when a person forces his wife from his home he is liable to the stranger to whom she is thus compelled to resort for necessaries. The case has very little bearing on this one. Here the custody of the child was in the father; his residence with the mother was not by order of the court, or because abandoned or compelled to leave the paternal roof, but because he preferred the society of his mother, and the mother invited and induced it, by her conduct, against the wishes of the father. Manifestly the case should not be considered as authority under the circumstances. But treat this, for the sake of argument, as a case where there was an abandonment of mother and child before the divorce, so that the court, in its discretion, placed the custody of the child with the mother as a matter of necessity, but without provision for compensation for its support, and we then have, substantially, *Finch v. Finch*, 22 Conn. 411, decided in 1855, cited in the opinion of the court, but unfortunately, the part

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of the opinion relied upon, which refers approvingly to *Stanton v. Willson, supra*, is from the dissenting opinion of Justice ELLSWORTH, while the rule of the early case, in the opinion of the court by Chief Justice CHURCH, one of the most eminent jurists that has graced the bench of that court, was expressly disapproved. The contention was that because of the duty the father owed to the child, the mother who supported it could herself enforce that duty by recovering compensation for her services in a direct action for that purpose. In deciding the case, the court said, in effect, that the question is not what are the reciprocal rights of the children and parents as respects each other, but what are the duties as between themselves; that a divorced wife who has taken the children from the father, stands in no more favorable position to recover for their support than a stranger; that the mere moral duty to support is not sufficient to support a promise; and that nothing short of a contract, express or implied, will warrant a recovery. Speaking of the claim made, that the difficulties which broke up the home and led to the divorce and award of the custody of the child to the wife should be held sufficient to support a contract obligation to pay for the necessary support of the child (the theory mentioned by my brethren in support of the decision here), the court said: "*Stanton v. Willson is the only case that we know of in which such a claim has ever been sustained.*"

From the foregoing we might proceed at great length to review the authorities, substantially all in accord as I read them, that no recovery can be had in a case like this, except upon a contract obligation, and that the doctrine is elementary that mere moral or legal duty, as between parent and child or the parent and the public, constitutes no foundation for the liability, nor is it material at all except as circumstances from which a promise may be inferred; and that such inference cannot arise when in fact repelled by the proof that the father was anxious and willing to support his child

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and was prevented from doing so by the conduct of the child or the mother, or both, as in this case. Says Lord ABINGER, C. B., in *Mortimore v. Wright*, 6 Mees. & W. 482: "A father, who gives no authority and enters into no contract, is not liable for goods sold to his infant son. The mere moral obligation affords no inference of a promise." The idea discussed by Lord ABINGER was that, so long as the father stands willing to support his child so that support is not of necessity furnished by a stranger, he incurs no obligation to another in the absence of a contract of some kind. So in *Seaborne v. Maddy*, 38 Eng. C. L. 194, it was held that no one is bound to pay another for maintaining his children unless he has entered into some contract so to do; that every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another to perform that duty and charge him in an action. To the same effect is the entire body of English law on the subject, from the time of Blackstone to the present, and to the same effect are substantially all American authorities as I read and understand them. *Cushman v. Hassler*, 82 Iowa, 295; *Jackson v. Mull* (Wyo.), 42 Pac. Rep. 603; *Lapworth v. Leach*, 79 Mich. 16.

The only question left is, Is there any circumstance here from which a contract can be inferred? It may be conceded that slight circumstances will be sufficient, but I am unable to find evidence of any such circumstances preserved in the record. On the other hand, the circumstances repel all such inferences. In *Cushman v. Hassler*, *supra*, it was held that, while from unexplained residence of a child with its mother, the legal custody being in the father, a contract may be implied to pay the latter for her services, when such residence is explained as contrary to the wish of the father the inference is effectually repelled. That appears to fit the circumstances of this case most perfectly, and is in accordance with reason and common sense. So in *Lapworth v.*

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Leach, supra, it was held that the moral obligation is not sufficient to support by inference the existence of an implied contract; that where the mother voluntarily supports her child she cannot recover therefor as upon contract. The idea expressed by the court was that proof that the support was voluntary and that the father was willing to support the child himself, in the absence of any express promise or circumstances from which a promise to pay for the support could be implied, left no room for inference that a contract relation existed between the parties. Again, in *Ramsey v. Ramsey*, 121 Ind. 215, an exceedingly well-considered and instructive case, where the facts were much like those in the instant case, except the strong evidence of parental affection and desire of the father for the society of and privilege to educate and support his child in his own way that exists here did not exist there, the court said, in effect, that while the rule that by moral and legal obligation the duty was on the father, primarily, to maintain his infant child during the years of infancy and tenderness, the rule must also be recognized, which lies at the very foundation of all cases where a third person has discharged the obligation of the father, that it must in every instance be predicated upon contract, express or implied, and that mere voluntary residence of the child with the mother, without some evidence of abandonment on the part of the father, is not sufficient to show a promise by implication to compensate the mother for keeping the child.

We hesitate to go further in this discussion. The excuse for proceeding so far is the importance of the question involved, and the wide departure which, in my judgment, the decision rendered is from the settled rule on the subject. I cannot subscribe to the doctrine that, where a child resides with its mother by choice and through her maternal influence over it, after the father has exhausted all the resources that strong affection for his child can suggest to secure his

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presence under the paternal roof, he can be held liable to the mother because of the moral or legal obligation to support, which, under the circumstances, cannot be said to have been violated at all, unless it be a violation not to proceed to the extreme of compelling obedience of the child by force or legal proceedings. I cannot subscribe to the doctrine that a father can be held liable as upon an implied promise, when all the circumstances obviously repel such an implication; that after he has done all above indicated, in order to be saved harmless from the liability of being called upon and compelled to respond to a third party for the expense of supporting his child, he must resort to the extremity of compelling the child's obedience. If such is the law, any disobedient child may desert his father's home, accept support from another, and a right of action will thereby accrue to such other against the father for the child's support. The law has been held contrary to such view, as I understand it, for time out of mind. The fact that the person furnishing the support away from the parental roof is the mother does not change the rule, but the moral obligation of the mother and the maternal relation to the child, and the natural desire for his society rather repel than support an implication of implied contract relations.

CODY and others, Respondents, vs. CODY, Appellant.

January 18 — February 8, 1898.

Jurisdiction: Dodge county court: Trusts: Parties: Fraud: Collateral attack: Holding court in place other than county seat.

1. By the judgment in a divorce action title to the real estate of the husband was vested in a guardian *ad litem* charged with a trust duty or power in trust for the husband, to be executed as directed by the county court of Dodge county. By sec. 2465, R. S. 1878, as

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amended by sec. 1, ch. 31, Laws of 1879, that court is given powers and jurisdiction in all civil actions and proceedings (with certain exceptions not necessary to be considered) concurrent with and equal to the jurisdiction of the circuit court. *Held*, that as a court of general equity jurisdiction the county court of Dodge county had jurisdiction, not limited by county lines, over the execution of the trust.

2. Neither the children of the *cestui que trust* nor the divorced wife, who had been awarded a sum of money as permanent alimony and in lieu of dower, had any interest in the property which gave them a legal right to notice of the proceedings to have the trust executed.

3. Fraud in the procurement of a judgment does not affect the jurisdiction of the court rendering it, so as to render the judgment open to collateral attack.

4. Under sec. 2471, R. S. 1878 (providing that the county judge may adjourn any term of the court to his office, or to some other place, when the court cannot be conveniently held at the court house on account of the sitting of the circuit court, "or for any other cause"), the county judge of Dodge county had ample discretionary power to hold court at his office in a city other than the county seat for the purpose of hearing an order to show cause in a proceeding to execute a trust, made returnable at a special term of court to be held at that place.

APPEAL from an order of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

This is an appeal from an order of the circuit court for Jefferson county overruling a demurrer to the complaint. The object of the action is to set aside as fraudulent and void a certain deed of all of Dr. James Cody's real estate, made January 28, 1888, to the defendant, *W. G. Cody*, his son, and a mortgage thereon for $20,000 made by the defendant to one Frank B. Tuttle, and also to have the title of the property adjudged to be in the plaintiffs and defendant jointly. The plaintiffs are three of the children and heirs at law of Dr. Cody, and the administrator of his estate, and the defendant is his only other child and heir at law.

The complaint shows that on August 4, 1872, Dr. Cody's family consisted of himself, his wife, one daughter, *Adaline*

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Cody (now *Adaline Salick*, one of the plaintiffs), and one son, *William G. Cody*, the defendant; that the wife died on the last-named day, and that Dr. Cody married Theresa Kelly January 28, 1880, he being then sixty years of age, and owning real and personal property worth $20,000; that by said second marriage he had two children, *Edward* and *James A. Cody*, who are plaintiffs in this action and appear by their guardian *ad litem*. The complaint further charges that the defendant, *W. G. Cody*, immediately after the second marriage of his father, formed a plan to fraudulently secure for himself all of his father's property, and for that purpose he deliberately attempted to alienate the affections of his father from his second wife. Then follow numerous allegations showing the progress of the defendant's efforts in this direction, which it is unnecessary to set forth.

It is sufficient to say that the complaint charges: That the defendant finally succeeded in his attempts, and alienated the affections of his father from his second wife, and also succeeded in obtaining from his father, by undue influence and fraud, a deed of the farm in Dodge county, which is the real estate in litigation, on the 27th of September, 1886; his father being at that time mentally incompetent to transact business and in fact insane. That in April, 1887, Mrs. Cody commenced an action for divorce in the circuit court for Jefferson county, in which she joined *W. G. Cody* as a co-defendant and sought to set aside the conveyance of said farm. That the venue of said action was changed to Dane county, and thereafter A. L. Sanborn, Esq., was appointed guardian *ad litem* of Dr. Cody in said action. That in November, 1887, this action was settled by stipulation, and a judgment entered granting Mrs. Cody an absolute divorce, together with the custody of the two minor children and $4,000 permanent alimony. That the judgment also provided that Mrs. Cody, *W. G. Cody*, and Dr. Cody execute a conveyance of said real estate to Mr. Sanborn,

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who should thereupon execute a deed of the same, in trust for Dr. Cody, to such person as the Dodge county court should designate, provided such court should deem it necessary to provide a trustee, with all such declarations of trust as said county court should determine. That thereafter Mrs. Cody, Dr. Cody, and *W. G. Cody* executed a deed of said property to Mr. Sanborn. That in the month of December, 1887, the defendant and F. B. Tuttle, his attorney, falsely and fraudulently represented to Mr. Sanborn that Dr. Cody had been restored to sanity, and was a resident of Dodge county, and desired proceedings to be taken in said Dodge county court to carry out the trust imposed upon him in the divorce action, and that thereupon Mr. Sanborn made a petition to said Dodge county court, applying for the appointment of a trustee for the doctor, if necessary, and that he (Sanborn) be directed to convey to such trustee, or to such other person as the court should determine, for the benefit of said James Cody. That the defendant and said Tuttle fraudulently procured an order to show cause upon such petition from the county court of Dodge county, returnable at a special term of said court to be held at the county judge's office at Beaver Dam, December 27, 1887, and that said order to show cause was served upon Dr. Cody, and service thereof admitted by him, although he was at the time insane. That by fraud and imposition the defendant and said Tuttle unlawfully procured from said county court on December 27, 1887, an order whereby Mr. Sanborn was directed to deed to the doctor all said real estate, and the doctor was directed to deed the same to the defendant, and the defendant was directed to execute to Tuttle a bond and mortgage in the penal sum of $20,000 for the doctor's support during the doctor's life, and Mr. Sanborn was further directed to deliver to the doctor all personal property in his hands as guardian *ad litem*. That the defendant and Tuttle procured said order to be made by said county court by

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falsely and fraudulently representing that the doctor was fully competent to receive and hold said property, and that he opposed the conveyance to a trustee, and by presenting to said court false affidavits as to the doctor's condition, when in fact the doctor was insane. That no notice of said proceeding was ever given to either of the plaintiffs in any way. That said deed and the bond and mortgage were all executed according to said order, and that on May 13, 1893, the defendant fraudulently procured from said Tuttle the satisfaction of said mortgage, and recorded the same. That Dr. Cody died intestate in October, 1894, being then an inmate of the Northern Hospital for the Insane. That the plaintiffs had no knowledge or notice of the two deeds or mortgage until within a year of the commencement of this action, nor did they discover the facts constituting the fraud until within said year.

The relief demanded is that the doctor's deed of January 28, 1888, to the defendant, and the mortgage from the defendant to Tuttle of the same, be declared null and void, and that the title be adjudged to have been in the doctor at the time of his death, and to be now in his four children and heirs at law, and that the defendant account for the rents, issues, and profits of said real estate.

For the appellant there was a brief by *Spooner, Sanborn & Spooner*, attorneys, and a supplemental brief signed also by *Burr W. Jones*, of counsel, and the cause was argued orally by *Mr. A. L. Sanborn* and *Mr. Jones*.

For the respondents there was a brief by *Geo. W. & H. S. Bird*, and oral argument by *Geo. W. Bird*.

WINSLOW, J. This is an action in equity brought in the circuit court for Jefferson county to set aside a deed and mortgage of certain real estate which had been made in obedience to an order of the county court of Dodge county. It is not attempted in this action to set aside or vacate the

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order itself, but to annul the acts done in pursuance of the order, while leaving the order itself unreversed and unrevoked by any direct proceeding. It is, within all the authorities, a collateral attack upon the order. The principles which govern a collateral attack upon an order or judgment of a court are well stated by Mr. Van Fleet in his work upon Collateral Attack at section 16, as follows: "In order to make a judgment void collaterally, either (1) a legal organization of the tribunal, or (2) jurisdiction over the subject matter, or (3) jurisdiction over the person, must be wanting, or (4) one or more of these matters must have been lost after it once existed." We understand it to be conceded by the counsel for the plaintiffs that this action is in fact a collateral attack upon the order of the Dodge county court, and upon that basis he argues, with his usual force and learning, that there was a lack of jurisdiction, both of the person and of the subject matter, in that court when the order in question was made.

The Dodge county court was not a mere probate court when this order was made. It had been endowed with limited civil jurisdiction, in addition to the ordinary probate powers. By sec. 2465, R. S. 1878, as amended by sec. 1, ch. 31, Laws of 1879, it was given powers and jurisdiction in all civil actions and proceedings in law and equity (with certain exceptions not necessary to be stated) concurrent with and equal to the jurisdiction of the circuit court, when the amount in controversy does not exceed $25,000. The general provisions of law relating to circuit courts, and to civil actions and proceedings therein, are applicable to said county court. R. S. 1878, sec. 2466. Under these provisions there can be no doubt that within the prescribed limits the county court of Dodge county possesses concurrent and equal jurisdiction and powers over civil actions and proceedings, with the circuit court. *Platto v. Deuster*, 22 Wis. 482; *Geise v. Greene*, 49 Wis. 334; *Am. L. & T. Co. v. Bond*, 91 Wis. 204.

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By virtue of the judgment in the divorce action, the title to the real estate in controversy had been vested in Mr. Sanborn, charged with a trust duty, or a power in trust (it is immaterial which), to be executed as directed by the county court of Dodge county. Now, had the judgment directed that the trust or power should be executed under the command of the circuit court for Dodge county, we think that no contention would be raised as to the jurisdiction of that court to act in the matter upon proper application. The general jurisdiction of the circuit courts over the execution of trusts and powers of all classes is undeniable, and is not limited by county lines, and the provision that this trust or power should be performed under the direction of the circuit court of a certain county would not confer jurisdiction upon that court, but simply operate as a command to the guardian *ad litem* to invoke the already existing power and jurisdiction of the designated court to direct his action. Such being the law with reference to the circuit court, no reason is perceived why the same power and jurisdiction did not exist in the county court of Dodge county, there being no claim that the property in question exceeded in value the legal limit of jurisdiction of that court. These considerations seem to settle the question as to the jurisdiction of the subject matter.

As to the jurisdiction of the person, we can perceive no serious question. All the persons who had any legal interest in the matter were before the court when the order was made. The guardian *ad litem* was there, moving the court to act as it was his clear duty to do under the divorce judgment. The deceased, Dr. Cody, who owned the beneficial interest in the property and for whose benefit alone the entire proceeding was devised, was duly served upon, besides being in fact represented by his guardian *ad litem* in the divorce action, who was acting in his interest. The divorced wife had no interest in, or lien upon, the property.

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She had been awarded $4,000, as permanent alimony and in lieu of dower, in the divorce action. The children had no legal interest, as probable heirs at law, prior to the death of their father. So it is not perceived that any other person or persons had any legal right to notice of the proceedings. The principle laid down in the cases of *Mohr v. Porter*, 51 Wis. 487, and *Mohr v. Manierre*, 101 U. S. 417, is applicable.

As to the numerous allegations charging fraud and imposition on the part of *William G. Cody*, both upon his father, upon Mr. Sanborn, and upon the court, it is very plain that none of them can affect the question of jurisdiction. A judgment may be procured by the grossest fraud, and yet be within the undoubted jurisdiction of the court which renders it. Upon collateral attack, the question is not whether the judgment was obtained by fraud, but whether it was rendered without jurisdiction.

But it is claimed that the order of the Dodge county court was void because not made at the county seat of the county, but at the chambers of the judge in another city. (R. S. 1878, sec. 2440.) The complaint charges, in several places, that the proceeding was before the "county court of Dodge county," and that the order was made by the "county court." Having charged that the order was made by the court, it is perhaps doubtful whether this question is open, because, if the contention is well founded, then the act was not the act of the court at all. But the statute (R. S. 1878, sec. 2471) expressly provides that the county judge may adjourn any term of the court to his office, or to some other suitable place, when the court cannot be conveniently held at the court house on account of the sitting of the circuit court, "or for any other cause." This certainly gives the county judge ample discretionary power to hold court at his office, as was done here. He would seem to be the sole judge of the sufficiency of the cause for doing so.

Our conclusion is that upon this complaint the order of

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the county court cannot be collaterally attacked, and, consequently, that the demurrer should have been sustained.

It is due to Mr. A. L. Sanborn, who is a highly-respected member of the Dane county bar, to state that the complaint does not in any way charge him with any improper action in the entire proceeding.

By the Court.— Order reversed, and action remanded with directions to sustain the demurrer.

TEWELES, Appellant, vs. LINS and another, Respondents.

January 18 — February 8, 1898.

ATTACHMENT. (1) *Traverse of affidavit: Assignee for benefit of creditors.* (2) *Order: Appeal: Exceptions.* (3) *Dissolution as to part of claim.* (4) *Adjusting cross demands.*

1. The traverse of an affidavit for attachment by both the debtor and his assignee for the benefit of creditors, is *held* sufficient.
2. The determination of the court on the issue raised by the traverse of an affidavit for attachment is an order, and may be reviewed on a direct appeal therefrom without any exception to it having been taken.
3. An attachment issued on the ground that defendant had fraudulently contracted the indebtedness to plaintiff, may be sustained as to a part of such indebtedness and dissolved as to the remainder.
4. Cross demands between the parties cannot be established and adjusted on the trial of the issue raised by the traverse of an affidavit for attachment.

APPEAL from an order of the circuit court for Waukesha county: WARHAM PARKS, Circuit Judge. *Affirmed.*

This was an action brought by the plaintiff for the recovery of a money demand against the defendant, in which an attachment was issued and executed against the defendant's property. The amount of the debt was stated in the affi-

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davit for attachment at $1,800, over and above all legal set-offs, and that it was due on express contract. The ground for the attachment was stated to be that the plaintiff had good reason to believe, and verily did believe, that the defendant, *Lins*, was about fraudulently to convey away, sell, and conceal his property, with intent to cheat and defraud his creditors, and that the defendant fraudulently contracted the debt upon which the affidavit was founded, intending then, at such time, to cheat and defraud the plaintiff thereof. The defendant made a general assignment for the benefit of creditors to *A. J. Frame*, and the defendant and his said assignee both traversed the affidavit for the attachment, as to the grounds alleged therefor.

The issue so joined was duly tried before the court, and it was found: (1) That no representations of solvency were made by the defendant, whereby the credit for the sum of $1,046.10 was obtained by the defendant from the plaintiff. (2) That September 9, 1895, the defendant obtained from the plaintiff the sum of $750, upon the representation that he (the defendant) had large amounts of grain in his warehouse at Eagle, Wisconsin, which he would consign to the plaintiff in consideration of such advance; that in truth and in fact he had no such amount of grain in such warehouse as he represented to the plaintiff; that the value of the grain so had and possessed by the defendant was less than $300; that the representations so made by the defendant were with intent to deceive the plaintiff, and that the plaintiff believed in and trusted in the representations so made, by reason whereof he advanced to the defendant $750. (3) That the plaintiff was deceived thereby. (4) That the defendant had stored in the possession of the plaintiff a lot of wool, upon which the plaintiff had advanced moneys, the said moneys being a part and parcel of said sum of $1,046.10; that the net product of said wool was $548.03; that plaintiff was entitled to apply said sum upon the payment of said sum of

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$1,046.10. (5) That after the levy of the attachment, and before the assignment for the benefit of his creditors by said *J. A. Lins*, he shipped and consigned to the plaintiff a car load of oats and a car of barley, which were sold by the plaintiff, and produced the net sum of $239.84, which sum of money the plaintiff now holds and possesses, and which should be applied in satisfaction of said sum of $750. (6) That there was due the plaintiff from the defendant, at the time of the making of the affidavit for attachment herein, the sum of $1,796.10.

The court found as conclusions of law: (1) That the allegations of the attachment as to the sum of $1,046.10 are not proven. (2) That the allegations of the affidavit for attachment as to the sum of $750 were fully proven, and that the plaintiff have judgment therefor, together with his costs and disbursements. Wherefore it is ordered that said attachment be, and the same is hereby, sustained, in the sum of $750; that there should be credited upon said sum the amount of $239.84; that said attachment be not sustained as to the sum of $1,046.10, but that plaintiff retain and apply upon said amount the sum of $548.03, the product of the sale of the wool; and that the plaintiff recover the costs of the attachment, taxed and allowed at $557.10.

It does not appear that there was any trial as to the merits of the demand upon which the suit was brought. At the close of the testimony the court made the order hereinbefore set forth, sustaining the attachment as to the $750, and dissolving it as to the remaining sum of $1,046.10; the defendant having asked "for an order sustaining the attachment as aforesaid, which motion was granted in part, and denied in part," and to which exception was taken. The plaintiff appealed from the part of the judgment or order in favor of the defendant, dismissing the attachment.

Henry W. Dunlop, for the appellant.

For the respondent *Frame* there was a brief by *Ryan & Merton*, and oral argument by *R. N. Austin* and *E. Merton*.

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PINNEY, J. 1. Some question was made at the argument as to the sufficiency of the traverse of the affidavit, and of the right of the defendant's assignee to join in the same, but no question appears to have been made in that respect in the court below. In *Eureka Steam Heating Co. v. Slote-man*, 67 Wis. 119, it was held that, where both the assignor and his assignee for the benefit of creditors appear and traverse the affidavit for an attachment in an action against the former, the plaintiff is in no way prejudiced by the order making the assignee a party defendant and permitting him to traverse the affidavit. The traverse must therefore be held sufficient. The defendant had a right to traverse the affidavit, notwithstanding he had made an assignment of his property for the benefit of his creditors. *Keith v. Armstrong*, 65 Wis. 225. But, upon the traverse of an affidavit for an attachment, neither the alleged liability, nor the amount thereof, can be denied. R. S. 1878, sec. 2745; *Littlejohn v. Jacobs*, 66 Wis. 600. The so-called judgment, from a part of which the appeal was taken, was a mere order, and subject to appeal only as such. R. S. 1878, sec. 2746.

2. The finding upon the trial of the traverse was confined to the cause alleged for the attachment, namely, whether the indebtedness of the defendant to the plaintiff was fraudulently contracted; and there was no finding as to the allegation that *Lins*, the defendant, was about fraudulently to convey away, sell, and conceal his property, with intent to cheat and defraud his creditors. The case, in that respect, appears to have wholly failed. The bill of exceptions does not contain sufficient evidence to warrant a finding in support of such cause.

The issue in respect to whether the debt was fraudulently contracted extended to the entire indebtedness of $1,800 stated in the affidavit. We perceive no reason for holding that the cause for attachment in such case is not, so to speak, divisible,— that it may be proved and found to have existed

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as to part of the debt, and not as to the remainder, as in the present case. The court sustained the attachment as to the sum of $750, and ordered that it be not sustained as to the sum of $1,046.10; finding that the allegations of the attachment as to the sum of $1,046.10 were not proven, but were fully proven as to the said sum of $750.

The finding embraces cross demands between the parties, but there is no finding as to the amount due to the plaintiff upon the cause of action upon which he sued, nor was any judgment given on that question. It was not within the scope of the issue under the traverse to establish or adjust the cross demands mentioned in the finding. These questions could only properly be investigated and determined upon the trial of the issue as to the merits in respect to the plaintiff's cause of action.

3. The evidence fully sustains the allegation of the affidavit that the plaintiff's debt, as to the sum of $750, was fraudulently contracted. The objective point of the plaintiff's appeal appears to be that part of the order made in favor of the defendant dismissing the attachment as to the $1,046.10. The finding, as well as the evidence given at the trial, is decisive to show that as to said sum of $1,046.10 the attachment should not have been sustained; and to that extent it was properly dismissed, although rightly sustained as to the sum of $750. The portion of the order appealed from by the plaintiff must be affirmed, and, as it is an appeal from a mere order, no exception to the order for that purpose was necessary. *Williams v. Holmes*, 7 Wis. 168; *Tubbs v. Doll*, 15 Wis. 640; *Dunbar v. Hollinshead*, 10 Wis. 505; *L. A. Shakman & Co. v. Koch*, 93 Wis. 598; R. S. 1878, sec. 3069, subd. 3.

By the Court.— The part of the order of the circuit court appealed from is affirmed.

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GORDON and others, Respondents, vs. HARLEY, Garnishee, Appellant.

January 19 — February 8, 1898.

Voluntary assignment: Preferences: Fraud.

Under sec. 1693*a*, S. & B. Ann. Stats. (providing that all assignments for the benefit of creditors which give preferences, except for wages of laborers, servants, and employees, earned within six months prior thereto, shall be void), a manifest purpose on the part of an assignor, in giving preferences to his daughter and minor son, to bestow upon them a bounty in excess of the wages earned by them within six months prior to the assignment, or at all, renders the assignment void.

APPEAL from a judgment of the circuit court for Dodge county: WARHAM PARKS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Burke & Babcock*, and oral argument by *Michael E. Burke.*

G. F. Martin, for the respondents.

CASSODAY, C. J. It appears from the record that December 9, 1895, one Max Roth made a voluntary assignment for the benefit of his creditors to the defendant *Harley;* that in and by such assignment the assignee was required to first pay all and singular the debts and demands set forth and enumerated in a schedule thereunto annexed, marked "Schedule C," the same being wages due to laborers, servants, and employees of the assignor, Max Roth, earned within six months prior to the date thereof, and after the payment in full of all the debts designated in Schedule C, in the manner so directed, then, by and with the residue and remainder of the net proceeds of the estate, to pay all other indebtedness of the assignor *pro rata* and without preferences; that Schedule C, so referred to in the assignment, gave as "Class No. 1 — Minnie Roth, for work, labor, and services as a

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clerk, six months, at $15 per week, for twenty-seven weeks, $405; Julius Roth, for work, labor, and services as a clerk, for six months, at $12 per week, for twenty-seven weeks, $324;" that *Harley* thereupon qualified as required by law, and entered upon the discharge of his duties as such assignee; that December 31, 1895, the plaintiffs commenced an action upon an account in the circuit court against Max Roth to recover $220, and at the same time garnished the defendant *Harley;* that *Harley,* as such garnishee, answered, denying all liability, and justified under the assignment; that the plaintiffs elected to take issue with such answer, which was in due form; that February 11, 1896, the plaintiffs recovered judgment in the principal action against Max Roth for $247.69; that subsequently such issue in the garnishee action was tried by the court.

At the close of the trial the court found, in effect, as matters of fact in addition to the facts stated, that in and by the assignment and Schedule C thereto attached Max Roth attempted to prefer his daughter Minnie Roth and minor son Julius Roth as preferred creditors, for labor performed by them; that in and by such pretended preferences more than six months' time was included in the amount which the assignee was directed to pay to each of said children; that during the entire time Max Roth owned the stock of goods, etc., delivered to *Harley,*— which was about six months,— the average sales per day were not much, if any, in excess of five dollars; that the services of the son and daughter were not worth to exceed one half the amount so preferred to them; that the sums so preferred and directed to be paid by the assignee were greatly in excess, and, in fact, double, the amount due them; that at the time of the service of the garnishee summons said *Harley* was indebted to, or had in his possession and under his control personal property, effects, and accounts belonging to, Max Roth, with no lien or interest therein, to the amount of $1,058.36 in cash, and accounts of a nominal amount.

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As conclusions of law the court found, in effect, that *Harley* was liable as garnishee to the plaintiffs in the sum of $247.69; that the plaintiffs were entitled to have said judgment paid; that the pretended assignment was fraudulent and void as to the plaintiffs; and judgment was therein ordered in favor of the plaintiffs accordingly.

From the judgment so entered the garnishee appeals.

The statute provides, in effect, that any and all assignments which contain or give any preference to one creditor over another creditor, except for the wages of laborers, servants, and employees earned within six months prior thereto, shall be void. Sec. 1693*a*, S. & B. Ann. Stats. That statute was considered in *Conlee Lumber Co. v. Ripon L. & Mfg. Co.* 66 Wis. 481. It was there held that "a mere mistake in giving preference to the whole claim of a creditor, when a part only might lawfully be preferred, will not invalidate an assignment." A father may, it is true, emancipate his minor son, and relinquish all right to his subsequent earnings. *Monaghan v. School Dist.* 38 Wis. 100. So a father may, undoubtedly, employ his adult children; and, in making an assignment for the benefit of creditors, may, within the limits of the statute cited, prefer them and other employees for his indebtedness to them for such services, earned within six months prior to making the assignment. But this exception in the statute cannot be lawfully used as a cover to prefer such servants for grossly extravagant wages, nor for wages earned more than six months prior to the making of the assignment.

According to the findings of the trial court, there was a manifest purpose, in giving the preferences, to bestow a bounty on the assignor's children in excess of their wages earned within six months,— or earned at all. Such findings appear to be supported by the evidence; certainly we would not be justified in disturbing them upon this appeal. Upon such state of facts, the statute declares that the assignment shall be void. We have no more authority to extend the time

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mentioned in the statute one week than we have to extend it one month or one year, nor have we any authority to enlarge such right of preference so as to include wages not earned at all, much less not earned within the period designated.

By the Court.— The judgment of the circuit court is affirmed.

TRELOAR, Administrator, Appellant, vs. OSBORNE, Respondent.

January 19 — February 8, 1898.

Appeal: Exceptions to findings.

A finding of the trial court cannot be reviewed on appeal unless an exception thereto is contained in the bill of exceptions.

APPEAL from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit judge. *Affirmed.*

For the appellant there was a brief by *Ryan & Merton*, and oral argument by *E. Merton.*

Aldro Jenks, for the respondent.

PINNEY, J. This action was brought to enforce a liability against the defendant, under sec. 1773, R. S. 1878, as a stockholder in a corporation which had transacted business with the plaintiff's intestate, and had given her its promissory note for $1,400, before one half of its capital stock had been subscribed, and before twenty per cent. thereof had been actually paid in, as prescribed by said section. The answer put in issue all the allegations of the complaint, and there was a trial before the court without a jury. The court found that the allegations of the complaint were not sustained by the proof, and that the defendant was entitled to judgment dismissing the plaintiff's complaint, with costs. Judgment was perfected accordingly, from which the plaintiff appealed.

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A bill of exceptions was settled, but it did not contain any written exception to the finding of the court. Exceptions to the finding, to be available on appeal, must be inserted in the bill of exceptions. R. S. 1878, sec. 2875; *Cramer v. Hanaford*, 53 Wis. 85. Otherwise the sufficiency of the evidence to sustain the finding cannot be inquired into on appeal from the judgment. *Saukville v. Grafton*, 68 Wis. 192. In the absence of such exceptions, the only question for consideration will be whether the pleadings and findings warrant and support the judgment. *Mead v. Chippewa Co.* 41 Wis. 205; *Wis. River Imp. Co. v. Lyons*, 30 Wis. 61; *Thomas v. Mitchell*, 27 Wis. 414. In the absence of any proper exception to the finding, its correctness cannot be reviewed on this appeal, and the judgment of the circuit court must therefore be affirmed.

By the Court.— It is so ordered accordingly.

FISCHER, Respondent, vs. SCHULTZ and another, Appellants.

January 19 — February 8, 1898.

Fraudulent conveyances: Evidence: Homestead: Selection: Waiver.

1. Plaintiff commenced a tort action against the owner of a farm, in which she recovered judgment. Before the action was brought to trial the defendant conveyed the farm without consideration to his minor son, who lived with him on the farm, by a deed dated three years before it was executed and acknowledged. At the same time the son executed and delivered to his father a conveyance of the premises, in form a warranty deed, but in fact a mortgage to secure the payment of a note for $2,000. A finding that the conveyance to the son was fraudulent and void as to the plaintiff, is *held* to be sustained by the evidence.
2. In an action to set aside as fraudulent a conveyance of land, part of which was a homestead, and to subject the land to the lien of plaintiff's execution, the debtor by failing to make selection of his

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homestead or to claim any specific part of the land as such in his answer, waived his statutory right of selection; and it thereupon became the duty of the court, in order to prevent further litigation, to set off a homestead for him.

APPEAL from a judgment of the circuit court for Dodge county: WARHAM PARKS, Circuit Judge. *Affirmed.*

This is an action to set aside a deed of a farm consisting of seventy-three acres, made by *William F. Schultz* to his son, *Charles R. Schultz*, on the ground that the same was fraudulent as to the plaintiff.

On the trial it appeared that in September, 1893, the plaintiff commenced an action of tort against the defendant *W. F. Schultz*, and recovered judgment thereon in November, 1894, for $1,000 damages, and costs, and that execution was issued on said judgment, and returned unsatisfied; that at the time of the commencement of said action *W. F. Schultz* owned a farm of seventy-three acres of land in Dodge county, and had owned and occupied the same for many years; that at said time the defendant *C. R. Schultz*, his son, who was then between nineteen and twenty years of age, lived with his father upon said land; that on the 10th day of November, 1893, *William F. Schultz* executed a deed of all said land to said *Charles R. Schultz*, which deed was dated November 1, 1890, but was acknowledged and executed November 10, 1893. At the same time *Charles R. Schultz* executed and delivered to his father a conveyance of the same premises, which was in form a warranty deed, but was in fact given to secure a note of $2,000, payable ten years after November 1, 1890, with interest at five per cent. thereon.

The circuit court found that the deed and mortgage were not made in good faith, and that no consideration was ever given for the deed, and that said deed and mortgage were made with intent to defraud the creditors of *William F. Schultz*, and for the special purpose of defeating any judgment which the plaintiff might obtain. The court further

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found that the south forty acres constituted the homestead of *William F. Schultz*, and set aside the transfer of all that part of the premises not included in the homestead.

From this judgment the defendants appeal.

For the appellants there was a brief by *Malone & Bachhuber*, and oral argument by *J. E. Malone.*

For the respondent the cause was submitted on the brief of *Lewis & Lewis.*

WINSLOW, J. Careful perusal of the evidence satisfies us that the findings of the circuit court to the effect that the deed of the farm made by the father to his son was fraudulent and void because made without consideration and for the purpose of defeating the plaintiff in the collection of any judgment which he might obtain, are entirely justified by the evidence. This being so, the only question remaining is as to the homestead.

The farm was composed of seventy-three acres of land, being one forty and the north thirty-three acres of another forty adjoining it on the south. The buildings were located upon the south thirty-three acres. The defendant *William* testifies that in November, 1890, he made an oral arrangement with his son to deed the land to him (his son being then sixteen years of age), and that the deed made in November, 1893, was simply an execution of this parol agreement; that when the parol agreement was made he (*William*) stated that the east forty acres — that is, a long strip of land off the east side of the seventy-three acres — was his homestead. There was never anything done to indicate this alleged selection in any way. The fact is that the east strip so claimed comprises the most valuable part of the land, the west part being low and swampy. There was no other evidence of selection of homestead at any time. The story is improbable on its face, because there was nothing to call for a selection at that time, and the trial judge evidently disbelieved this

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testimony, as he disbelieved the entire testimony with regard to the supposed parol contract. He was entirely justified in such conclusion by the evidence. The findings, in effect, negative the alleged selection.

After the defendant *William* had thus conveyed his entire farm, he never attempted to make any selection, nor in his answer did he claim any specific forty as his homestead. In this situation it was plainly the duty of the court to put at rest the whole matter in controversy so far as it could be done, and prevent further litigation. The purpose of the action is to subject the land, or some part of it, to the levy of the plaintiff's execution, and the judgment would be plainly imperfect and defective if it decided that a part of the land was subject to levy, but did not decide which part. The claimant of the homestead having failed to make his selection or make any specific claim in his pleadings, we think it became the duty of the court to fix the homestead right, on the ground that the claimant had waived his statutory right of selection.

By the Court.— Judgment affirmed.

DE MORRIS, Respondent, vs. WILBUR LUMBER COMPANY, imp., Appellant.

January 19 — February 8, 1898.

Liens upon logs and lumber: Upon what enforceable: Undertaking on attachment:* Bona fide *purchaser: Action, at law or equity? Time of filing claim.

1. In an action in the circuit court to enforce a statutory lien for work on logs, timber, and lumber, an undertaking on attachment, under sec. 5, ch. 139, Laws of 1891, is not required, unless ordered by the circuit court or judge on ten days' notice of the application therefor to the person who sued out the writ of attachment.

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2. A person holding a lienable claim under the laws of this state, for work done on logs, timber, or lumber, may enforce collection of the entire claim out of any part of the property subject to such lien.
3. Where a person, without notice, actual or constructive, of the existence of lienable claims on logs, timber, or lumber, under the statutes of this state, buys such property in the regular course of trade, pays full value therefor, transports the same at considerable expense for freight charges from the place of manufacture, and thereby enhances its market value, he is not, by reason of the facts, entitled to protection as a *bona fide* purchaser or otherwise, against the lien claim, because secs. 1, 4 of the lien law of 1891 provide that the lien claim shall take precedence of all claims, liens, or incumbrances created on, or sales made of, the property, either before or after the doing of the lienable work, and that no purchase of the property, within the time for filing the lien claim, shall prejudice the rights of the claimant.
4. Actions to enforce liens for labor on logs and timber are actions at law.
5. Under the provisions of the lien law, to the effect that for work done between the 1st day of November and the 1st day of May following, or commenced on a day prior to the 1st day of November and continued without interruption to a day between the 1st day of November and the 1st day of May following, the lien petition shall be filed on or before the 1st day of June next thereafter, and that for work commenced after the 1st day of May and terminated before the 1st day of November following, the lien petition shall be filed within thirty days after the doing of the last work, the filing of a lien petition on the 3d day of April for work done partly between the 1st day of May and the 1st day of November preceding, and partly thereafter, the whole work not being continuous from first to last, is too late to preserve the lien for work done prior to such 1st day of November.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

Action to enforce lien claims for labor performed in manufacturing logs into lumber and shingles and other products; it was commenced against S. M. Holmes, the employer, and a writ of attachment was duly issued, under which, without any undertaking having been given as required in ordinary

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attachment proceedings for the collection of debts, a quantity of shingles which had been sold to the *Wilbur Lumber Company* and paid for by such company, without any notice, actual or constructive, of any lien claims thereon, was seized by the sheriff and held to satisfy plaintiff's claim. Such proceedings were thereafter duly had in the action that the lumber company was made a defendant under the statute, and answered, taking issue on the allegations entitling plaintiff to a lien judgment upon the property attached. The defendant lumber company also moved the court to vacate the attachment because no undertaking was given. The motion was denied, and the issues raised by the answer were tried by the court without objection, resulting in findings of fact to the effect that:

(1) At Ogema, in Price county, Wisconsin, between January 7, 1896, and March 30, 1896, under contract with the defendant Holmes, plaintiff performed seventy days' work as a teamster and cook, and his wife the same number of days' work as a cook, in converting logs and timber into shingles and other manufactured products, at the agreed price of $1.54 per day, and the amount due and unpaid therefor is $63.65.

(2) At the same place, between February 5, 1895, and March 27, 1896, Joe Breo performed 171½ days' work for the defendant Holmes at her request, in manufacturing logs and timber into shingles and other products, at the agreed price of $2 per day, and the amount due and unpaid for such work is $295.26.

(3) At the same place and in the same manufacturing business, between September 23, 1895, and April 26, 1896, Charles Ek performed 106¾ days' labor for the defendant Holmes at her request, and at the agreed price of $16 per month for forty-one and one fourth days, and $18 per month for the balance of the time, and the amount due and unpaid for such work is $19.30.

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(4) At the same place and in the same manufacturing business, between October 27, 1895, and March 12, 1896, John Hokenson performed seven days' work and packed 1,691½ thousand shingles for the defendant Holmes at her request, for which, at the agreed price, there is due and unpaid $61.87.

(5) The last work in each of the cases mentioned was as follows: Plaintiff, March 30, 1896; John Breo and Charles Ek, March 27, 1896; John Hokenson, March 12, 1896. Breo, Ek, and Hokenson duly assigned their claims to the plaintiff for collection, and thereafter, on the 3d day of April, 1896, plaintiff filed, in the office of the clerk of the circuit court for Waukesha county, Wisconsin, a claim for a lien upon the shingles which were thereafter attached in this action for the amount due on the several labor claims mentioned, which petition was verified and contained a statement of facts as required by law, and that plaintiff claimed a lien upon the property described therein under the laws of this state on the subject.

(6) In the manufacturing operations at the mill, the logs, after being delivered on the mill floor, were converted into various products as seemed best by the workmen. The shingles were divided into three grades, part marked "B. M. Holmes, Ogema, Wis.," part "E. R. Graham, Ogema, Wis.," and part "Extra No. 1."

(7) The defendant lumber company, by contract made July 1, 1895, purchased all of the two grades first mentioned that might be manufactured during the season of 1895 and 1896, to be paid for as shipped. All such shingles were, prior to April 1, 1896, shipped to the company at Waukesha, Wisconsin. Neither plaintiff nor his assignors knew of such contract of purchase, but did know that the shingles were shipped out of the mill yard about as manufactured. All the manufactured product left at the mill was attached on lien claims prior to the filing of plaintiff's petition.

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(8) The shingles shipped to the lumber company were piled in their yard at Waukesha, and there levied upon under the writ of attachment in this action, the value thereof being $560.12, which value included freight charges paid by the company, to the amount of $147.29. Such freight charges were paid without any notice on the part of the company, actual or constructive, of any lienable claims upon the property.

(9) Each of the persons mentioned, who performed services in manufacturing the shingles, received pay from the defendant Holmes to an amount in excess of such person's labor upon the shingles involved in this action.

On such findings of fact the court concluded:

1. The amount due upon the several labor claims mentioned in the complaint is $440.08, with interest thereon from April 1, 1896, for which sum, with the costs and disbursements of this action, to be taxed according to law, plaintiff is entitled to a lien upon the shingles described in the complaint and attached in the action, situated in the yard of the defendant lumber company at Waukesha, Wisconsin.

2. Plaintiff is entitled to have the said shingles sold to satisfy the amount due and the costs, as aforesaid, unless the defendant lumber company shall, within thirty days after notice of the entry of the judgment, pay into court for the benefit of the plaintiff the sum of $560.12, being the value of the shingles. For any deficiency in the satisfaction of the plaintiff's claim and costs, after applying thereon the proceeds of the shingles, a judgment is to be rendered against the defendant Holmes.

Judgment was thereafter entered in accordance with the findings, and with provisions in regard to its enforcement and the entry of a judgment for a deficiency; it provided substantially the same as in case of a judgment in an action for the enforcement of a mechanic's or material man's lien under the statutes on that subject.

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The defendant lumber company appealed from the judgment.

For the appellant there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*.

For the respondent there was a brief by *George H. Singleton*, attorney, and *Cate, Sanborn, Lamoreux & Park*, of counsel, and oral argument by *B. B. Park*.

MARSHALL, J. Sec. 5, ch. 139, Laws of 1891, being that part of the lien law under which this action was brought affecting the remedy by attachment, is sec. 3333, R. S. 1878, as it has come down from such revision through various reenactments with slight changes. The original punctuation of the section has been so changed that with the introduction by amendment of the words "by any circuit court or judge thereof," where hereafter indicated, the real intention in respect to the necessity for an undertaking on attachment in actions in the circuit court has been somewhat obscured. Restoring the punctuation where needed, that part of the section in controversy now stands as follows: "No undertaking upon such attachment, or security for costs in actions hereunder before justices of the peace, need be given, unless upon application of some defendant in the action, showing by affidavit that he has a good and valid defense to the plaintiff's claim, and to how much thereof, and if it be only to a part of such claim, unless the residue be paid to the plaintiff at the time of the application, which payment, if made, shall not affect the jurisdiction of the court; and no order shall be made *by any circuit court or judge thereof*, requiring the giving of such undertaking or security for costs, except upon ten days' notice thereof to the plaintiff." The meaning of the section, by thus restoring the punctuation, becomes very plain. The words "no undertaking upon such attachment" plainly refer to actions in the circuit court. As the section originally stood, ten days' notice was

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required of an applicant for an undertaking in the circuit court or security for costs in justice's or municipal court. The change confined the ten days' notice to actions in the circuit court, and probably courts having the same jurisdiction and practice in such matters. That construction agrees with what was held by the trial court. Therefore the order refusing to set aside the attachment cannot be disturbed.

Only a small part of the labor for which the lien was claimed was performed in manufacturing the particular property attached in the action and against which the lien was filed. It was contended on the part of the appellant that the attached property could not be held except for the labor performed by plaintiff and his assignors in actually producing it from the logs and timber and preparing such logs and timber for the mill. If the statutes giving a lien for labor on logs and timber were so strictly construed as to limit the lien upon each part of the property to the work done on such part, it would defeat the entire scheme, designed to protect a favored class of laborers, for reasons sufficient to satisfy the legislature of its wisdom. No such construction was intended, as is abundantly evidenced by the history of legislation on the subject, all tending in the one direction of securing, so far as practicable, to laborers on logs and timber security against any probability of losing their wages. This court has responded to the manifest legislative intent by constantly applying liberal rules of construction to such statutes. *Jacubeck v. Hewitt*, 61 Wis. 96; *Kollock v. Parcher*, 52 Wis. 393; *Hogan v. Cushing*, 49 Wis. 169; *Winslow v. Urquhart*, 39 Wis. 260. In *Jacubeck v. Hewitt*, *supra*, it was distinctly held that a person entitled to a lien on logs or timber, or the manufactured product therefrom, may enforce it for his entire lienable claim against any portion of the property. That is decisive of the question. The trial court rightly decided that the fact that only a small part of plaintiff's claim was for work done in manufacturing the shingles

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attached in this action did not affect the right to resort to such property to collect the entire debt. There is nothing in *Glover v. Hynes Lumber Co.* 94 Wis. 457, inconsistent with the foregoing. There the evidence was to the effect that a part of the labor was lienable and part not, and there was no evidence by which the two classes of work could be separated. The subject of whether the entire lienable part could be enforced against a portion only of the property upon which lienable work was performed was not involved, discussed, or decided.

It is contended that the action is equitable, and that the court should have protected the appellant on equitable principles, at least to the extent of the enhanced value of the property by reason of the transportation of it from Ogema to Waukesha, such enhanced price being measured by the amount paid for transportation, $147.29. The character of the action was entirely misconceived, both by the court and counsel, as clearly appears from the entire proceedings from the commencement of the trial; it is not an equitable action; it has none of the elements of an equitable action; it is an action at law, and clearly so, and has heretofore been so decided by this court. *O'Reilly v. M. & N. R. Co.* 68 Wis. 212. The action may be commenced in justice's court or circuit court according to the amount claimed; judgment goes against the party personally liable absolutely and without waiting for any sale of the property, against which it is adjudged to be a lien; the trial is by jury as a matter of right, unless waived by the parties; and the judgment under the statute must be enforced by an execution as in ordinary civil actions; and the execution issues in the ordinary form, except it must contain a special command to satisfy it out of the property upon which the lien is adjudged. *Wright v. Pohls*, 83 Wis. 560; *George v. Everhart*, 57 Wis. 397, and other cases of the same character do not refer or apply to actions to enforce liens for work on logs and lumber; but

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to actions to enforce liens of mechanics and material men under the statute on that subject. The latter class of actions, under the old statute, were actions at law; but the change in the procedure, brought about in the Revision of 1878, conforming such procedure largely to that for the foreclosure of mortgages, it was determined by the court, made such actions essentially equitable in their character. *George v. Everhart, supra; Willer v. Bergenthal*, 50 Wis. 474; *Spruhen v. Stout*, 52 Wis. 517. The judgment in this case, that the property be sold unless the defendant lumber company pay into court the value of the shingles as found by the court, within thirty days after notice of the entry of judgment, and providing for a report of sale and judgment for a deficiency, if any, against defendant Holmes as the person liable for the debt, following substantially the statutes on the subject of liens of mechanics and material men, was erroneous. Judgment should have been rendered against the appellant, if at all, for the costs incurred by the plaintiff in maintaining the lien claim, and against the defendant Holmes for the debt and the entire costs in the action. The aggregate amount of the recoveries should have been adjudged a lien against the property described in the complaint, and the enforcement of the judgment should then have followed according to the requirements of sec. 3340, R. S. 1878.

There is a further reason why the claim that appellant should have been protected to the amount it added to the value of the property cannot be sustained. If it had any right in that regard, in the absence of some statute to the contrary, it grew out of an equitable subrogation to the lien claim of the carrier, by reason of paying the freight charges; and section 1 of the lien law provides that the labor lien shall take precedence of all other claims, liens, or incumbrances created, whether they accrued before or after the doing of the work.

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It is further claimed that the appellant was entitled to protection as an innocent purchaser, it having paid full value for the property and purchased the same in the regular course of trade without notice, actual or constructive, of the existence of the lien claims. That contention is sufficiently met by section 1 referred to, in language to the effect that labor liens shall take precedence of any sale of the property, whether made before or after the time of doing the work for which the lien is claimed. It is also met conclusively by section 4, which provides that no interest shall be acquired in the property subject to the lien, during the time limited for filing the lien petition, to the prejudice of the lien claimant.

There is a still more serious question presented by the record than any heretofore referred to, and that is whether the lien petition was filed in time to preserve any of the alleged lien claims, except that of the plaintiff for the labor of himself and wife. Section 1, of the lien law of 1891, divides lienable work into four periods as follows:

(1) Labor done between the 1st day of November and the 1st day of May following.

(2) Labor commenced on a day prior to the 1st day of November and continued without interruption to a day between the 1st day of November and the 1st day of May following.

(3) Labor commenced after the 1st day of May and terminated before the 1st day of November following.

(4) Continuous labor from the 1st day of November, or a day prior thereto, to a day beyond the 1st day of May following.

For labor claims coming within periods 1 and 2, the petition is required to be filed on or before the 1st day of June after the termination of such labor. For labor claims coming within periods 3 and 4, the petition must be filed within thirty days after the performance of the last work. The

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findings of fact show that the work of plaintiff and his wife was within the first period mentioned; that is, it was done between the 1st day of November and the 1st day of May following, and the lien petition was filed on or before the 1st day of June following, to wit: April 3, 1896. The findings further show that the labor of Breo was performed between July 25, 1895, and March 27, 1896. As to whether it was continuous between the dates mentioned was not found, and the evidence shows conclusively that it could not have been continuous. Therefore such work does not fall within the second period mentioned and there is obviously no period mentioned by the statute that fits the work as an entirety. The part done before the 1st day of November necessarily belongs to the second period,— work done between the 1st day of May and the 1st day of November following; and the lien petition filed on the 3d day of April following was too late to cover that part of the work; it was in time only for that done between the 1st day of November and the 1st day of May following, which is covered by the first period mentioned in the lien law. There is the same difficulty as to the lien claim for the labor of Charles Ek and John Hokenson. There is no evidence in the case by which we can determine the amount of work done by either of them after the 1st day of November, 1895, for which, on proper proof, a lien judgment might be rendered in the action. The lien as to all the assigned claims, for work done on and prior to the 1st day of November, 1895, necessarily must fail according to the plain provisions of the statute and the reasoning of this court in prior cases. *McGinley v. Laycock*, 94 Wis. 205; *Kendall v. Hynes Lumber Co.* 96 Wis. 659.

Some other questions are presented for consideration by the record and have been determined, but none of them require special mention in this opinion.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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THURSTON, Respondent, vs. THE BURNETT & BEAVER DAM FARMERS' MUTUAL FIRE INSURANCE COMPANY, Appellant.

January 19 — February 8, 1898.

Insurance against fire: Construction of policy: Use of wood in engine: Court and jury.

1. Under the rule that where the language of a contract is plain and unambiguous, and where words or terms in a contract may be reasonably construed in either of two ways but extrinsic evidence is not resorted to for the purpose of aiding in the construction, the proper construction of the contract is for the court, the proper construction of language in an insurance policy, to the effect that the insurer would not be liable for loss by "fires caused by the use of steam engines on the premises insured, other than threshing machine engines using coal for fuel, with sufficient wood to kindle or start the fire," was a question solely for the court.
2. Such clause prohibited the use of wood, except to efficiently start combustion in the coal; the use of wood thereafter was within the excepted risk; and when wood was so used, up to a short time before the fire occurred, such fire was not caused by an engine "using coal for fuel with sufficient wood to kindle or start the fire," because coal was the last fuel put into the fire-box before the fire occurred.
3. The evidence being to the effect that wood was used to make power for a considerable length of time, and then coal was put into the furnace as needed, and as a helper, for about fifteen minutes, which disappeared before the fire occurred, such fire was clearly within the excepted risk, and there was no question on the subject to be left to the jury.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dodge county: A. SCOTT SLOAN, Circuit Judge. *Reversed.*

Action to recover on two policies of fire insurance. The property destroyed was grain in stacks. The fire was started by sparks from a threshing machine engine in operation on the premises. A by-law formed a part of each contract of insurance, which was as follows: "This company will not hold itself liable for loss caused by the use of steam engines

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on the premises, except steam threshing engines using coal as fuel, with sufficient wood to kindle or start the fire." The principal disputed question on the pleadings and evidence was whether the fire occurred through a cause not covered by the contracts of insurance, by reason of the by-law referred to.

A special verdict was ordered, containing questions covering the subject in dispute, such questions being as follows: "(1) What was being used for fuel in the engine when the stacks of wheat were destroyed? (2) Was more wood used in the engine than was sufficient to kindle or start the fire in the engine? (3) At the time of the fire, was wood being used to produce power to run the engine?"

The court instructed the jury, among other things, that there is not any great conflict in the evidence. "The question is, Do you find for the plaintiff or the defendant? If the plaintiff was using, at the time the fire occurred, wood for the purpose of producing power to do the threshing, he cannot recover. If he was only using wood for the purpose of kindling or starting the fire, if it had got down, he can recover." In respect to the second question the court said: "You are to determine from the language what was intended,— what is the fair, reasonable, ordinary meaning of the language used? You are to say as to what it means,— the ordinary signification among men. What does it mean to kindle or start a fire?" In regard to the first question the court said it was the only vital question in the case; "What was being used when the stacks of wheat were destroyed,— wood, coal, or both? That second question presents the subject more decidedly; and the next question throws some light on the dispute." The court later said, "The meaning of the first question is, What was in the fire-box at the time the fire occurred?" and, generally, said that the three questions were practically the same: "Were they using wood to kindle or start up the fire, or to produce

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power?" 'That the jury should first determine in their minds, as if there was no special verdict, whether the machine, under the evidence, was being run in accordance with that provision of the policy or in violation of it.' And further said, "When you get the question settled, reduce your answers to writing, to the questions, so they will conform to the real spirit of the contract."

All the questions, and those upon which the right to recover depended, were answered in favor of the plaintiff. Numerous exceptions were filed to the charge, and there was a motion to set aside the verdict as contrary to the evidence and to grant a new trial, made, denied, and the ruling duly excepted to. Judgment was rendered in plaintiff's favor, from which this appeal was taken.

For the appellant there was a brief by *Sawyer & Sawyer* and *H. K. Butterfield*, and oral argument by *E. W. Sawyer*.

For the respondent there was a brief by *Malone & Bachhuber*, and oral argument by *J. E. Malone*.

MARSHALL, J. Fires caused by the use of steam engines on the premises insured by the defendant, other than threshing machine engines using coal as fuel, with sufficient wood to kindle or start the fire, were excepted out of and not covered by the contracts of insurance. Such excepted fires cannot be included by judicial construction or by the verdict of a jury, without reading into the contract language the parties clearly did not put there. Neither courts nor juries are permitted to do that. The meaning of the term "coal as fuel, with sufficient wood to kindle or start the fire," was the important question on the trial; such meaning appears to be plain and unambiguous; no extrinsic evidence was admissible to explain it, nor was any such evidence received or offered. The case comes clearly within the rule that where language is plain and unambiguous, the apparent import of the words must govern, and the rule that where there is no uncertainty

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as to the meaning of the words used in the contract, and where such uncertainty exists but there is no extrinsic evidence or circumstance bearing on the subject to be considered in determining the meaning attributed to them by the parties when the contract was made, the proper interpretation of the words and construction of the contract are solely for the court. *Ganson v. Madigan*, 15 Wis. 144; *Murphey v. Weil*, 92 Wis. 467. Therefore the trial court erred in leaving the construction of the contract to the jury.

As indicated, no difficulty is perceived in determining the meaning of the term in question, when it is kept in mind that, when plain language is used in such connection as to leave no room to say, reasonably, that the parties might have intended either of two meanings, the apparent import of the words as generally understood must govern. Story, Cont. § 780; *Mississippi River Logging Co. v. Wheelihan*, 94 Wis. 96. In such cases, the rule that all ambiguities, obscurities, and uncertainties in a policy of fire insurance are to be resolved most favorably to the assured, has no application whatever.

The words "coal for fuel, with sufficient wood to kindle or start the fire," meant that wood was permitted to be used only with coal and for the one purpose of igniting the coal by aid of the more combustible quality of the wood, and that when the coal was once sufficiently ignited the use of wood was no longer allowed. The clause did not permit the use of wood exclusively for a considerable period of time to produce power, or at all for that purpose, and if wood was nevertheless used to produce power, either alone or with coal, for two or three hours or for half an hour, and then only coal was fed into the fire box for fifteen or twenty minutes, the latter circumstance did not render the engine one using coal for fuel, with sufficient wood to kindle or start the fire, within the meaning of the policy. Such a construction would do violence to the language used by the

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parties. It would not be construction at all, but the making of a contract not contemplated by the parties at the outset. If, after sufficient wood was used to kindle or start the fire, wood was used to operate the engine, in whole or in part, even though coal was the last fuel fed into the fire-box before the loss occurred, the engine was manifestly not one using coal for fuel, with sufficient wood to kindle or start the fire, but was an engine using wood and coal for fuel to produce power.

With the foregoing construction of the contract of insurance, we turn to the consideration of the exception to the ruling of the trial court, refusing to set aside the verdict and grant a new trial.

The evidence is practically undisputed that in the forenoon, and for a short time after the noon hour, the engine was operated by the use of wood exclusively as fuel. It was then moved to the place where the fire occurred, by the use of wood as fuel. During the day, up to the time of the fire, the engine stack was guarded by a screen on account of the use of wood for fuel. The machine was started and run at the setting where the fire occurred, for half an hour, with wood for fuel, exclusively. A man was then sent for coal to the coal wagon, which had not been moved up from a previous setting. He brought one lump. Part of that was used before the fire occurred, which happened from fifteen to twenty minutes thereafter. The engineer testified that he sent for the coal because he thought it would be a helper; that he could keep up steam with wood, but thought that it was nice to have a little coal as there was plenty of it; that there was always some wood in the fireplace. There was much other evidence, but none to materially vary the foregoing. True, the engineer said that when he got the fire fit to burn coal he burned coal exclusively, but it is undisputed that he kept up steam with wood thirty minutes or thereabout, before any coal at all was used; in fact, that he had

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been using wood exclusively during the whole day, up to the time that the one lump was brought to him about fifteen minutes before the fire occurred; that the coal wagon was left back at another setting; that the only fuel at the scene of operations for use, except that carried on the engine, none of which was used, was a pile of wood; and that there was some wood in the fire box all the time down to the instant the fire occurred.

In the light of the foregoing and the correct construction of the contract of insurance, argument is unnecessary to show that the finding of the jury that no more wood was used with the coal than was sufficient to kindle or start the fire was contrary to the undisputed evidence. The fire was started in the engine before it was moved to the setting; power was produced by the use of wood exclusively, in moving the engine and in operating it till a few moments before the fire occurred, and coal was then used, broken off of the one lump, as a helper. Plaintiff failed to establish any liability on the policies. When the evidence was closed there was no question, really, for submission to the jury. The inferences from the evidence, that more wood was used than was necessary to kindle or start the fire, were all one way.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

HOUSTON vs. THE STATE.

January 19 — February 8, 1898.

State veterinarian: Destruction of diseased animals: Liability of state for tort of officer.

1. The destruction of valuable cattle, free from any disease, by the state veterinarian under color of ch. 467, Laws of 1885, as amended by ch. 76, Laws of 1887 (authorizing the destruction of animals in

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case they are affected with some "contagious or infectious disease of malignant or very fatal nature"), is unlawful and tortious.

2. Sec. 3209, R. S. 1878 (providing that "it shall be competent for any person deeming himself aggrieved by the refusal of the legislature to allow any just claim against the state, to commence an action against the state, by filing a complaint" with the clerk of the supreme court, etc.), relates only to claims which, if allowed, render the state a debtor to the claimant, and does not include a demand based upon unlawful and tortious acts of officers and agents of the state.

3. The legislature never having authorized an action against the state for unlawful and tortious acts of its officers or agents, no such action can be maintained.

ACTION commenced in supreme court. The defendant demurred to the complaint. *Demurrer sustained.*

This action was commenced in this court June 29, 1897. The amended complaint alleges, in effect, that during the time mentioned the plaintiff was a farmer, residing on his farm in the county of Kenosha; that he owned and had on the farm a standard herd of dairy cattle, consisting of sixty head of thoroughbred milch cows, Jerseys and Guernseys, and crosses of the thoroughbred cattle; that by ch. 467, Laws of 1885, as amended by ch. 76, Laws of 1887, provision was and is made for the appointment of a state veterinarian, whose duties are therein set forth; that under and by virtue of the said statutes the state assumed the right and power to invade the premises of any citizen of this state, and, by its officers and agents, to inspect the personal property of any citizen, and to destroy any property of any citizen, in certain cases and for certain purposes, as in the said laws specifically pointed out and designated, and for that purpose made provision for the appointment of a state veterinarian; that in November, 1895, one J. L. Scott was duly appointed and qualified, and, while acting as state veterinarian under and by virtue of the laws aforesaid, visited the premises of the plaintiff, as claimed by him, to inspect the herd of dairy cattle then owned by the plaintiff and kept on his farm, for

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the purpose therein indicated; that after such inspection the state veterinarian informed the plaintiff that said herd looked to be in an excellent condition and entirely free from any disease of any kind whatever, but that, inasmuch as complaint had been made to him that some of the cattle were diseased, he had concluded that it was his duty to test the herd for tuberculosis, by applying and using the so-called tuberculine test; that December 5, 1895, the state veterinarian, in his official capacity, acting for the defendant by virtue of said laws, did, as claimed by him, apply severally to the individual animals composing the herd the so-called tuberculine test for tuberculosis, and as a result of the test the state veterinarian announced that thirty-eight of the animals were affected with tuberculosis, and did then and there, by virtue of the authority he claimed to exercise as the agent of the state, condemn said animals as diseased animals, under the aforesaid laws.

The complaint further alleges that thereafter the state veterinarian went before a justice of the peace in the town, and, in the form and in accordance with the rules prescribed by the statute in such case made and provided, did apply, on behalf of the state, for the appointment of appraisers of the thirty-eight head of cattle so condemned; that thereupon the justice, acting under the provisions of the law, and as agent of the state, appointed three appraisers of the cattle, who appraised the animals at $47 per head, amounting in the whole to $1,710; that said amount is very much less than the actual value of the animals; that the appraisers and officers and agents of the state found themselves, under and pursuant to said laws, charged with the duty, after appraising the cattle, of destroying or killing the cattle so condemned, and burning or burying the same; that no provision was or is made in the acts for paying the expenses thereby incurred; that the officers and agents of the state, to whom the said thirty-eight animals were delivered by the

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plaintiff pursuant to the directions of the state veterinarian, caused two of them to be killed, and made a *post mortem* examination of the same, and shipped the other thirty-six head to Chicago, for the purpose of having them sent to a fertilizing establishment to be slaughtered and thus disposed of without cost and expense; that all of the proceedings herein related were made by and under the direction of the state veterinarian, acting for the state in pursuance of its laws, by virtue of which the state assumed the right and power to do the acts herein complained of, and the plaintiff surrendered control of the animals to the said veterinarian and the other officers of the law, as he supposed it to be his duty to do.

The complaint also alleged that the thirty-eight head of cattle so taken from the plaintiff and appropriated by the state for its uses and purposes, were strong, healthy, and in fine condition, and on the plaintiff's premises were of the value of $5,000 and upwards; that the two so slaughtered on the plaintiff's premises were, at a *post mortem* examination made by competent persons, found free from disease of any kind or nature; that as a matter of fact, no adequate test had been or was made; that none of the animals were afflicted with disease at the time they were condemned, but were at that time entirely free from disease, and healthy, strong, and vigorous animals; that the killing of animals affected with tuberculosis is not according to the most modern methods of treatment of such diseases; that the condemnation and destruction of the cattle at the time and in the manner aforesaid was wholly unnecessary as a matter of reasonable precaution to prevent the spread of disease, and a great and unnecessary waste of property; that this fact was unknown to the plaintiff until after such destruction.

It was also alleged that the plaintiff caused due and timely application to be made to the legislature, at the session thereof beginning in January, 1897, for relief, and payment to the

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plaintiff of compensation for damages thereby suffered, but that the legislature neglected and refused to give the plaintiff any pay or compensation whatever for such damages; that the plaintiff has no remedy in the premises for the damages inflicted, except as against the state, since none of said officers were required to give bonds to indemnify persons suffering injury or loss as a result of their action when so acting, and all of those who conducted the proceedings herein are unable to respond in damages; that the damages suffered by the plaintiff by reason of such destruction exceed $5,000; that the thirty-six animals condemned and shipped to Chicago were not sent to the fertilizing establishment, but were sent to the regular market, and sold in the regular way, and examined by United States government inspectors in Chicago, who found the animals to be free and clear from all diseases whatever,—which fact was unknown to the plaintiff until recently, and since the presentation of his claim to the legislature; that none of the animals so condemned and destroyed were afflicted with any disease whatever, but were all sound and in good health, and of great value, at the time; that the acts of the state, the legislature, the veterinarian, and all of the officers acting for and in behalf of the state, clothed with such authority, wrongfully deprived the plaintiff of his property without due process of law, and without compensation, and in violation of sec. 13, art. I, of the constitution of Wisconsin, and in violation of the rights guaranteed to the plaintiff by the fourteenth amendment of the constitution of the United States, to his damage in the sum of $5,000, for which judgment is demanded.

To such complaint the defendant demurred upon the grounds (1) that the plaintiff has no legal capacity to sue; (2) that the complaint does not state facts sufficient to constitute a cause of action.

Charles E. Estabrook, for the plaintiff.

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For the defendant there were separate briefs by the *Attorney General* and *John L. Erdall*, first assistant attorney general, and oral argument by *Mr. L. J. Billings* and *Mr. Erdall.*

CASSODAY, C. J. It is not specifically alleged that the plaintiff accepted the two thirds of $1,710, at which the cattle so destroyed were appraised; but such acceptance, under the circumstances alleged, may be fairly inferred, and in fact seemed to be conceded on the argument. The view we have taken of the case, however, makes it unimportant.

It is fairly established, by adjudications too numerous to mention, that a state may, in the proper exercise of its police power, authorize the destruction of such property as has become a public nuisance, or has an unlawful existence, or is noxious to the public health, public morals, or public safety, without compensation, notwithstanding the prohibition in sec. 1, art. XIV, of the amendments to the constitution of the United States. *Bittenhaus v. Johnston*, 92 Wis. 596–598; *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1; *Lawton v. Steele*, 119 N. Y. 226; *S. C.*, affirmed, 152 U. S. 133. The question of such power, however, does not here arise. The demurrer admits the facts alleged in the complaint. The complaint alleges that none of the cattle destroyed were affected with any disease at the time they were condemned, but were each and all entirely free from any disease, and healthy, strong, and vigorous animals. The statute only authorized the destruction of animals in case they were affected with some "contagious or infectious disease of malignant or very fatal nature." S. & B. Ann. Stats. sec. 1492*a*. Unless the animals were so diseased in fact, their slaughter was without authority of law, and hence tortious. *Pearson v. Zehr*, 138 Ill. 48; *Miller v. Horton*, 152 Mass. 540.

The question recurs whether this suit can be maintained against the state for the injury sustained for such alleged

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unlawful destruction. Prior to the eleventh amendment to the constitution of the United States, it was held, in effect, that a state might be sued in the supreme court of the United States by an individual citizen of another state. *Chisholm v. Georgia*, 2 Dall. 419. But since that amendment, it is believed, the courts have uniformly held that no state could be sued in any court without its express consent *Louisiana v. Jumel*, 107 U. S. 711; *Chicago, M. & St. P. R. Co. v. State*, 53 Wis. 509. The same is true of the United States. *Schillinger v. U. S.* 155 U. S. 163; *U. S. v. North Carolina*, 136 U. S. 211; *State v. Hill*, 54 Ala. 67; *Clark v. State*, 7 Coldw. 306; *Railroad Co. v. Alabama*, 101 U. S. 832. Our constitution expressly provides that "the legislature shall direct by law in what manner and in what courts suits may be brought against the state." Const. Wis. art. IV, sec. 27. In pursuance of that provision, the legislature at an early day provided that "it shall be competent for any person, deeming himself aggrieved by the refusal of the legislature to allow any just claim against the state, to commence an action against the state, by filing a complaint, setting forth fully and particularly the nature of such claim, with the clerk of the supreme court, either in term time or in vacation." R. S. 1878, sec. 3200. This section only relates to claims which, if allowed, render the state a debtor to the claimant. *Chicago, M. & St. P. R. Co. v. State*, 53 Wis. 509; *Clodfelter v. State*, 86 N. C. 51; *State v. Hill*, *supra*. This statute does not include a demand based upon the unlawful and tortious acts of officers or agents of the state. *Hill v. U. S.* 149 U. S. 593. Thus, in Massachusetts it is held that a similar statute did "not extend to a claim for damages resulting from the misfeasance or negligence of its officers and agents in performing their duties." *Murdock Parlor Grate Co. v. Comm.* 152 Mass. 28. The same construction of the word "claim" has been applied by this court to demands against municipalities. *Kelley v. Madi-*

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son, 43 Wis. 638; *Bradley v. Eau Claire*, 56 Wis. 168; *Jung v. Stevens Point*, 74 Wis. 547; *Sommers v. Marshfield*, 90 Wis. 59. The law is well established that neither the state nor the United States is answerable in damages to an individual for an injury resulting from the alleged misconduct or negligence or tortious acts of its officers or agents. *Gibbons v. U. S.* 8 Wall. 269; *Langford v. U. S.* 101 U. S. 341; *German Bank of Memphis v. U. S.* 148 U. S. 573; *Clark v. State*, 7 Coldw. 306.

It follows from what has been said that this action for the alleged unlawful and tortious action of the officers and agents of the state cannot be maintained against the state, for the simple reason that the legislature has never authorized an action in this court for such misconduct.

By the Court.— The demurrer is sustained, with leave to amend within twenty days, and in case of default the complaint will be dismissed.

KELLAR, Respondent, vs. EARL, Appellant.

February 8 — March 1, 1898.

Highways: Laying out and opening: Notice to remove fences.

1. The laying out of a highway is not the taking or appropriation of the land for public use. Until the highway has been opened by order of the supervisors, the public acquires no right to its use, and the owner may use the land in the same manner as he did before the highway was laid out.
2. Under sec. 1284, R. S. 1878 (providing that whenever a highway is laid out through inclosed, cultivated, or improved lands the supervisors shall give the owner or occupant notice to remove his fences within such time as they may deem reasonable, not less than thirty days, and that no person shall be required to remove such fences between April 1 and November 1 in any year), and sec. 1337 (providing that no person shall be required to remove any fence under

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the provisions of secs. 1334–1336, except between November 1 and April 1, unless the same shall have been made within three months next before the making of the order for removal), an order served September 27, requiring a landowner to remove his fence within forty-five days, and an order served October 25, requiring him to remove it within thirty days, were nullities, where such fence had not been built within three months of the making of the orders.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

This was an appeal from a judgment for $10 and costs, given in an action against the defendant for an alleged trespass in cutting down and removing portions of certain fences December 9, 1896, upon the lands of the plaintiff, to wit, lot 8, section 15, town 28, range 9 W., and which the defendant claimed were in a public highway in the town of Lafayette, in Chippewa county, in a road district over which he was overseer.

On behalf of the plaintiff evidence was given to the effect that on the 9th of December, 1896, the defendant was on the tract of land between the plaintiff's place and one Nelson's, who owned the forty east of the plaintiff's lot, being the N. W. ¼ of the N. W. ¼ of section 14 of the same town, and that he cut down a wire fence that day between the plaintiff's land and Nelson's, which ran north and south eighty rods, and that the town claimed there was a road there; that the fence he then had there was in the same place as the one the defendant cut down. The wire was cut and moved away into plaintiff's field. He had a fence south of his barnyard, and one north of it, and a fence running east and west between his house and barn. A map was put in evidence showing the location of the plaintiff's house and barn, and of the fences cut down and removed, and of the garden.

The plaintiff testified that the road had been traveled along where the fence was that had been cut down, some

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three years previous; that when the defendant came there he explained that the town wanted him to cut the fence down that was in the road. He testified that his barnyard was seven rods square, and one of the fences cut down was on one side of his barnyard; that his barnyard and garden had been from the first where they then were, and that he had had his barn and house there since 1888, but that there was no road or appearance of a road there then, where the line was; that when he commenced living on lot 8 the travel was directly over on Nelson's land, east of plaintiff's, but after the town board came and laid out the road it was along the north and south line, and had been for three years. The plaintiff gave evidence to the effect that he had a garden between his house and barn, in which there was all kinds of stuff,—strawberry plants, rhubarb, etc.; that when they came there to lay the road on Nelson's side of the fence, at that time, it was brush, no broken land; that his land was broken first; two or three years after that, Nelson changed his line; that the plaintiff did not open his line, but maintained his fence there, and his garden extended out from the house to the line.

The defendant admitted that the fence was cut on the line a distance of about eighty rods, and that forty posts were taken down. The title to the land in question was admitted to be in the plaintiff. The evidence, as contained in the record, is extremely vague, uncertain, and fragmentary; and it is almost impossible to get any satisfactory idea of the real situation and relative location of the different objects mentioned. On behalf of the defendant, record evidence was given showing that a highway had been laid out on the north and south line May 27, 1892. On behalf of the defendant, J. S. Crandall testified, in substance, that he was chairman of the board of supervisors in 1892, and was present when the road was laid out on the line in dispute; that there was a fence there, as there is now, but not exactly where it now

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is; that there was nothing to interfere with laying the road there west of that line or on the line; that there was some garden there, some corn, and a strawberry bed; that there was space for a highway and garden after the land for the road was taken; that the fences stood east of the line in May, 1892, and stood there about May 10, 1897.

The defendant gave in evidence an order of the supervisors laying out the highway in question, and which awarded $15 damages to the plaintiff. A notice, signed by the supervisors and directed to the plaintiff, dated September 26, 1893, requiring him to remove his fences from within the bounds of said highway within forty-five days after the service of said notice, was served on the plaintiff September 27, 1893. Another like notice or order to the plaintiff, signed by the supervisors, dated October 25, 1896, was served on him on that day, reciting that a certain fence was in the center of the said highway, describing the line thereof, and that the piece of land that lay under said fence, and between the same *and the westerly line of said highway*, was a part thereof; and the said plaintiff was thereby requested to remove said fence beyond the limits of said highway within thirty days of the service upon him of a copy of such order. It was also shown that December 4, 1896, the defendant received from the said supervisors a notice requiring him, as overseer of highways, etc., "to remove all obstructions that encroach upon the said highway," describing it; and the defendant testified that after he got this notice, and on the 9th of December, he went there and cut down the fence. It was shown that the fence cut down was a little east of the line along the center of the highway for about eighty rods. The defendant testified that he cut the fence on the east side of the plaintiff's barn, right on the line, and on the north side one rod in; one piece might be two rods; that the fence was an old one. That it was taken up for the distance of eighty-five rods in length, and four rods at the

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north end, and one rod at the south end, was not disputed; and the defendant claimed he cut the parts down and laid the posts and wire in on plaintiff's land.

The court charged the jury that the notices were defective, and that, no proper notice having been given, the defendant could not go in there and tear down the fence, and that the jury should return a verdict for the plaintiff for the amount of damages he had sustained. The defendant excepted to this ruling. The jury found for the plaintiff in the sum of $10, and, a motion by the defendant for a new trial having been denied, the plaintiff had judgment on the verdict, from which the defendant appealed.

For the appellant there were briefs by *W. H. Stafford* and *James J. Lunney*, and oral argument by *Mr. Stafford.*

Arthur Gough, for the respondent.

PINNEY, J. The evidence was quite clear to the effect that the highway had been laid out over, upon, and through the inclosed and cultivated lands of the plaintiff, and that he had maintained a fence from an early day, substantially continuously, along, west of, and quite near the said north and south line upon which the highway was laid out, and that he resisted and opposed all attempts to open said highway over his land; but Nelson, who owned the land east of said line, afterwards built or set his fence back from said line easterly in the neighborhood of about two rods. The result was that the public travel could pass along said line upon the lands so fenced out by said Nelson, notwithstanding the plaintiff continued substantially to maintain his fence as before. There had evidently been a considerable contention between Nelson and the town authorities, on the one hand, and the plaintiff, on the other, as to the existence of the highway in question, and whether the plaintiff should remove his fence and open such highway for travel over, along, and upon the intervening strip between his premises

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and Nelson's land, where he had maintained a fence, as aforesaid, from a very early date. It will be seen, therefore, that the evidence did not, as in the case of *Bartlett v. Beardmore*, 77 Wis. 356, show that the alleged highway, as against the plaintiff, had become such by user or dedication, but that the rights of the public in and over the *locus in quo* depended wholly upon the validity of the proceedings in laying it out and attempting to open it and appropriate it to public use and travel.

By sec. 1284, R. S. 1878, it is provided that "whenever the supervisors shall have laid out, widened, or altered any public highway through any inclosed, cultivated, or improved lands, and their determination shall not have been appealed from, they shall give the owner or occupant of such lands notice in writing to remove his fences, within such time as they shall deem reasonable, not less than thirty days after giving such notice; but no person shall be required to remove such fences between the first day of April and the first day of November in any year." And sec. 1337 provides that "no person shall be required to remove any fence, under the" provisions of secs. 1334–1336, inclusive, "except between the first day of November and first day of April, unless the same shall have been made within three months next before the making of the order for the removal thereof."

The laying out of the road over the land of the plaintiff was not a taking or appropriating it to the public use. The public acquired no right to travel upon it until a further act was done; that is, until it was opened by order of the supervisors. This, under our statute, is necessary before the public can use the land as a highway; and until the right to use the property is vested in the public it cannot be said to be taken, and remains private property, and the owner can still use the land in the same manner he did before the road was laid out. *State ex rel. Evans v. James*, 4 Wis. 411.

The orders and notices show upon their face that, when

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they were made and given, the fence then existed and was maintained as contended by the plaintiff, and there was no evidence produced by the defendant to show that the highway had been legally opened over and upon the plaintiff's land, or that the fence in question had been built or made within three months next before the making of said orders for the removal thereof. Both the orders or notices directed to and served on the plaintiff were wholly void, for the reason that they required him to remove said fence between the 1st day of April and the 1st day of November, the first requiring him to remove it within forty-five days after the service thereof, September 27, 1893, and the other, served October 25, 1896, requiring him to remove the same within thirty days after such service on him. Both orders and notices were nullities. *State v. Egerer*, 55 Wis. 527; *State v. Clark*, 67 Wis. 229. By making the order of September 27, 1893, and by serving a copy of it, the supervisors, as the court said in *State v. Egerer*, *supra*, required the plaintiff to remove his fence during the inhibited period. This is precisely what sec. 1337, R. S. 1878, provides shall not be done between April 1st and November 1st, yet the order in question was made September 26, and served September 27, 1893; and the same was true as to the order made and served October 25, 1896.

Until a valid notice or order had been served upon him, the plaintiff had a right to use and occupy the *locus in quo*, and to maintain his fences thereon at his pleasure. It could not be considered an obstruction to the highway until he had been lawfully required by the supervisors to open it. As was held in *State v. Clark*, *supra*, the service of a void notice would not set the time running against the defendant in which he was by law required to remove his fence; and TAYLOR, J., in delivering the opinion of the court, said: "The statute is clear that a party cannot be required to remove his fences from within the boundaries of a highway

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at any time between the 1st day of April and the 1st day of November in any year, and a notice which requires him to remove such fences within such dates is a void notice. R. S. sec. 1337; *State v. Egerer*, 55 Wis. 527." This defect exists in, and is fatal to, both notices. For this reason the defense insisted on by the defendant wholly failed, and the circuit court properly directed the jury to return a verdict for the plaintiff for the amount of damages he had sustained; and the court properly denied the defendant's motion to set it aside and grant a new trial.

Other questions were made and argued, but, upon the whole record, it is entirely clear that the rulings of the circuit court were correct.

By the Court.— The judgment of the circuit court is affirmed.

KLIEFOTH, Respondent, vs. THE NORTHWESTERN IRON COMPANY, Appellant.

February 8 — March 1, 1898.

Master and servant: Negligence: Employment of incompetent servant: Injury to fellow-servant.

The complaint stated that the defendant employed an incompetent servant to take charge of boilers and engines in its blast furnace, and that plaintiff was injured by a negligent act of such servant in the line of his duty. *Held:*

(1) That the mere allegation that the servant performed a particular act negligently, and plaintiff was thereby injured, failed to show that the alleged negligence of the master in employing the incompetent servant was the cause of the plaintiff's injury.

(2) That the employment of an incompetent servant does not render the master liable to a fellow-servant for an injury to him caused by some negligent act of such incompetent servant, unless the injury is the result of such incompetence. If the injury be the result of a mere act of negligence of the incompetent servant,

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it comes within the rule that the master is not liable to an employee for an injury caused by the negligence of a co-employee in the same business.

(3) That to render mere negligence incompetence, there must be something more than mere failure of duty as to a particular act. There must be actual incompetency to do the work properly, either for want of physical or mental ability, or want of that mental balance and self-control that enables one reasonably to bring into use, with an ordinary degree of success, his intelligence and experience.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

Action for personal injuries. The complaint, omitting formal allegations, is in substance as follows: On the 21st day of December, 1895, the defendant had a totally incompetent employee by the name of Arndt, engaged as an engineer in charge of the engines and boilers in its blast furnace, with knowledge of such incompetence. On the same day plaintiff, while also in the employ of the defendant, without fault on his part, by reason of wilful negligence and careless acts of said Arndt in turning on the steam to a boiler in which plaintiff was at work in the usual course of his employment, was badly burned, scalded, and injured, externally and internally, whereby he was made to suffer great pain and inconvenience, and to expend large sums of money for doctors' bills and nursing, and contract obligations for such purposes, notwithstanding which he has not been wholly cured of his injuries, and they are to some extent of a permanent character. The compensation demanded is $20,000. The answer admitted the injury and the manner in which it was caused, but denied that Arndt was incompetent or that the injury was caused by his negligence or carelessness. The answer also put in issue the alleged extent of the injury and damage.

At the commencement of the trial defendant's counsel ob-

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jected to any evidence under the complaint, which objection was overruled and due exception taken thereto. The trial resulted in a special verdict, by which the jury found, among other things, that negligence of the defendant or its servants was the proximate cause of plaintiff's injury; that Arndt was incompetent; that plaintiff's place to work was not reasonably safe, and that the act of turning on the steam to the boiler in which plaintiff was working was the result of the carelessness of the defendant or its servants. The damages were assessed at $5,300. There was a motion to set aside the verdict and for a new trial, among other things, on the exception to the overruling of the demurrer *ore tenus*. Defendant appealed from the judgment.

C. H. Van Alstine, of counsel, for the appellant.

For the respondent there was a brief by *Malone & Bachhuber* and *Lawrence & Lamoreux*, and oral argument by *J. E. Malone*. They contended, *inter alia*, that it was the duty of the engineer in charge of the boilers to notify any person in them, when he was going to turn on the steam, that it would make the place in which they were at work dangerous or unsafe; and the negligence of the engineer in making such place unsafe was negligence of the master. *Brabbits v. C. & N. W. R. Co.* 38 Wis. 289; *Smith v. C., M. & St. P. R. Co.* 42 id. 520; *Dorsey v. Phillips & C. Const. Co.* id. 585; *Wedgwood v. C. & N. W. R. Co.* 44 id. 44; *Stetler v. C. & N. W. R. Co.* 46 id. 497; *Bessex v. C. & N. W. R. Co.* 45 id. 477; *Hulehan v. G. B., W. & St. P. R. Co.* 68 id. 520. A master, who hires an unskilful and ignorant man, knowing him to be such, and places him in charge of machinery, unnecessarily enhances the usual risks of those employed about it, and is liable for injuries caused to servants employed about such machinery, or in places made dangerous by the incompetent servant hired, as the act of the master in hiring such unskilful servant makes the place where his other servants have to work unsafe and dangerous, and increases the

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usual risk of their employment. Wood, Master & S. §§ 345, 348; 4 Wait, Act. & Def. 417; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 175; *Keegan v. Kavanaugh*, 62 Mo. 230; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Laning v. N. Y. C. R. Co.* 49 N. Y. 521; *Flike v. B. & A. R. Co.* 53 id. 549; *Corcoran v. Holbrook*, 59 id. 517; *Ford v. Fitchburg R. Co.* 110 Mass. 240; *Matthews v. Bull*, 47 Pac. Rep. 773.

MARSHALL, J. As we view this case, the decision of the question raised by the exception to the ruling of the trial court on the sufficiency of the complaint is decisive of the appeal. The only negligence of the defendant alleged, is that of knowingly placing one Arndt, an incompetent person for the work, in charge of the engines and boilers in its blast furnace, where such plaintiff and servant were co-employees. That is followed by an allegation that the injury to the plaintiff was caused by the wilful negligence and carelessness of said Arndt. Without the allegation of incompetence, it could not seriously be contended but that the complaint sets forth clearly a case of injury to an employee by the negligence of a fellow-servant, which, under one of the most familiar rules of the law of negligence, is *damnum absque injuria*. *Hoth v. Peters*, 55 Wis. 405; *Heine v. C. & N. W. R. Co.* 58 Wis. 528; *Pease v. C. & N. W. R. Co.* 61 Wis. 163. So the effect of the allegations contained in the complaint is to charge negligence of the master without charging that such negligence caused the injury complained of, unless it can be said that there is a sufficient connection between the charge of negligence of the master in that it employed an incompetent servant, and the charge that such servant, through his negligence and carelessness, caused the injury to plaintiff, to leave room for a reasonable inference that such negligence and carelessness was attributable to the

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incompetency alleged. If the master knowingly, or through want of ordinary care, employs or retains in his employ an incompetent employee, he is liable to a co-employee for any injury received by the latter in the common employment, provided such incompetency be the proximate cause of the injury. But however incompetent such servant may be, unless the essential causal relation exists between it and the injury necessary to actionable negligence, the master is not liable. So here, if the injury to the plaintiff is attributable to the negligence of Arndt, it does not reach back further, so as to connect with the alleged negligence of the defendant in employing Arndt, but stops with the negligent servant as the real producing or efficient cause, unless the mere act of negligence comes within the scope of the term *incompetence.*

In reaching the conclusion here, full effect is given to the very liberal rule for the construction of pleadings, that prevails under our system, stated in the recent case of *Miller v. Bayer*, 94 Wis. 123, in substance, thus: In determining whether a complaint states a cause of action the question is not whether the plaintiff used the most appropriate language in stating his case, but whether the language used will permit a construction which will sustain the pleading, and to that end such effect should be given to its allegations as will support rather than defeat it, if that can be done without adding, by way of construction, material words not necessarily implied, or giving to the language used a meaning that cannot be reasonably attributed to it.

In applying the foregoing rule it is important to look to the meaning of the words "incompetent" and "negligent," as ordinarily understood. The former means, want of ability for the purpose (Stand. Dict.); not adequate, sufficient, fit, suitable, or capable (Webst. Dict.). The latter means, careless, heedless, liability to omit what ought to be done, want of attention (Stand. Dict.); habitually omitting, care-

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less, heedless, neglectful, incompetent, thoughtless, or regardless (Webst. Dict.). So it is clear that the word "incompetent" signifies either ignorance of how to do a thing perfectly, or that mental make-up or acquired habit which renders one neglectful, careless, and incompetent, though possessing sufficient knowledge and experience to do with reasonable care and skill the work in hand. In such circumstances, the inattention or carelessness refers, not to a particular act, but to general character, so as to affect, in fact, the capacity of the person for the work he is employed to do. So laid down in *Maitland v. Gilbert Paper Co.* 97 Wis. 476, where very recently we had occasion to discuss this subject. It was there said, in effect, that a competent man is a reliable man, both as to physical and mental attributes and the disposition with which he generally does his work. So, capacity to do the work properly so far as physical ability is concerned, reasonable knowledge of how the work should be done, and the mental balance and self-control that enables one reasonably to bring into use his intelligence and experience, all go to the subject of competency. It has been frequently held that proof of a single act of negligence will not raise an inference of incompetence. It must necessarily follow that, ordinarily, a mere allegation that a person was negligent in the performance of some particular act is not equivalent to an allegation of incompetence, and will not raise an inference that the act was attributable to incompetence. *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Huffman v. C., R. I. & P. R. Co.* 78 Mo. 50.

From the foregoing it follows logically that the allegation in the complaint before us that the turning on of the steam was negligently done does not reasonably admit of an inference that the negligence was attributable to that incapacity which is the true test of incompetency, and the result is that we must conclude that the complaint fails to show, directly or by reasonable inference, by any allegation

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of fact, that the injury complained of was the result of the incompetence of Arndt, for which defendant would be liable, but does show, if anything, that it was attributable to mere negligence of Arndt, from which no liability of defendant can flow. Therefore, the demurrer *ore tenus* should have been sustained.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

HEMINWAY, Respondent, vs. REYNOLDS and another, Appellants.

February 8— March 1, 1898.

(1) *Appeal from county court: Correction of its records.* (2–5) *Wills: Probate: Jurisdiction: Notice: Proof of publication: Mistake in order: Presumptions: Record.*

1. Under sec. 4031, R. S. 1878 (providing that "in all cases not otherwise provided for, any executor, administrator, trustee, or any person aggrieved by any order, judgment, decree, determination, or denial of the county court . . . may appeal therefrom to the circuit court," etc.), the circuit court has jurisdiction to amend or correct the records of the county court upon appeal from an order of that court denying a petition for their correction.
2. Unless notice of the time and place of proving a will was given as required by sec. 3787, R. S. 1878, all subsequent proceedings based thereon are void as to such persons in interest as did not appear or assent thereto, or have not since supplied such want of appearance by acts clearly indicating an assent thereto or ratification thereof.
3. Testimony of the attorney for the proponent of a will that he was present when the will was admitted to probate, and remembered getting money from his client which he paid to the printer of a newspaper for printing notice of the proof of the will, and that an affidavit of the publication of such notice was made and filed by him with the county judge, but that he did not pretend to remember its contents; and testimony of the proponent that she gave

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such attorney money to pay the printer's fees, and thought she remembered seeing the notice in the papers, but did not know what kind of a notice it was that she saw, are *held* sufficient to sustain a finding that a notice was published, but entirely insufficient to sustain a finding that a proper and legal notice was given.

4. A decree, entered July 3, admitting a will to probate, recited substantially that notice had been given as required by an order of June 6. That order fixed the date of hearing as Saturday, July 3, and directed publication of notice "according to law." Saturday was in fact July 4 and a legal holiday upon which the court could do no work. The form of notice prescribed by statute is: "Notice is hereby given that at the ——— term of the county court to be held . . . on the first Tuesday of ———, A. D. 18—, the following matter will be heard and considered," etc., no day of the month being mentioned. *Held*, that the inference would arise that the notice as published fixed the day of hearing either on the first Saturday of July, or, as mentioned in the order, "on Saturday the 3d day of July." In the first event the notice would be illegal, and in the second misleading and deceptive and therefore insufficient.

5. Where the jurisdiction of a court is attacked directly, and there is no proof of the facts upon which the question of jurisdiction rests, no intendments in favor of jurisdiction can be indulged in except such as are supported by the record, if the record attempts to deal with that question.

APPEAL from a judgment of the circuit court for Dodge county: W. F. BAILEY, Judge. *Reversed.*

Anselmo Reynolds, then being a resident of Dodge county, in this state, died on May 2, 1891, leaving a will. At the time of his death, he owned a small amount of personal property and certain real estate in Dodge county. He left a widow, a daughter, *Cora Heminway*, the respondent, a son, *Frank S. Reynolds*, and a daughter, *Mary Calhoun*, all of full age. The widow died on December 4, 1891.

On June 6, 1891, the respondent presented the Reynolds will for probate to the county judge of Dodge county, and on that day the judge made an order "that the proofs of said instrument be heard before the judge of this court on *Saturday*, the 3d day of July, A. D. 1891, at 10 o'clock in the forenoon, at the office of the county judge in Mayville,

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in said county." The order further provided "that public notice thereof be given to the heirs at law of said deceased, and to all other persons interested, by publishing a notice according to law, for three successive weeks prior to said day of hearing, in the Dodge County Volksfreund, a weekly newspaper, printed and published at Mayville, in said county." On Friday, July 3, 1891, the will was presented and duly proven, a certificate of its probate duly issued, and letters testamentary were issued to *Cora Reynolds* (now *Cora Heminway*) as residuary legatee.

On October 27, 1894, *Frank S. Reynolds* filed in the county court of said county a petition asking to have the probate of said will set aside and vacated. On January 29, 1895, the respondent filed a cross petition for a correction of the records of said court by supplying proof of the publication of notice to heirs and all persons concerned, of the proposed probate of said will. On the same day, the court made an order requiring the parties to make up an issue for trial, and a complaint and answer were accordingly filed. At a hearing, on March 8, 1895, the county court denied the respondent's motion to correct the records as to the giving of notice of the probate of the will, and, without further proof, made an order vacating and setting aside the probate of said will. From this order respondent appealed to the circuit court.

Upon the hearing in the latter court the only matter litigated seems to have been whether the notice for hearing the proof of the will of Anselmo Reynolds had ever been given or not; and, after taking the proof, the court found substantially that such notice had, in fact, been duly published and proof thereof filed in the county court; and a judgment was entered reversing the order of the county court, and restoring and reviving the order admitting the will to probate, without prejudice to the right of *Frank S. Reynolds* to prosecute his petition in the county court as to all matters not disposed of by the judgment. From the judgment so entered this appeal is taken.

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For the appellants there was a brief signed by *Sawyer & Sawyer*, of counsel, and oral argument by *H. W. Sawyer* and *J. E. Malone.*

De W. C. Priest, attorney, and *Edward S. Bragg*, of counsel, for the respondent.

BARDEEN, J. It is insisted that the circuit court obtained no jurisdiction to amend or correct the records of the county court under the appeal from the order mentioned. Sec. 4031, R. S. 1878, is comprehensive in its terms, and seems certainly to warrant such appeal. It says: "In all cases not otherwise provided for, any executor, administrator, trustee, or any person aggrieved by any order, judgment, decree, determination, or denial of the county court . . . may appeal therefrom to the circuit court for the same county," etc. The act appealed from was within the ordinary judicial functions of the county judge, exercised in conformity with a plain provision of statute, and involved a substantial right, properly the subject of review. There is no force in the argument that the statute as to appeals does not apply because the provisions in regard to the amendment of records are grouped by themselves and separate from those portions treating of the general powers of the county court.

The remaining question is one of much more difficulty. It is insisted that, upon the record in county court and the proof given in the circuit court, there was nothing to show that a proper notice to heirs and others interested was ever given of the application to admit the Reynolds will to probate, as required by sec. 3787, R. S. 1878. The fact is admitted that there was no proof, by way of affidavit, of the publication of such notice, in the record of the county court, nor is there any entry relating to the same in any of the books in his office. If no such notice was in fact given, all subsequent proceedings based thereon were void as to such persons in interest as did not appear or assent thereto, or have not since supplied such want of appearance by acts

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clearly indicating an assent thereto or a ratification thereof. *O'Dell v. Rogers*, 44 Wis. 136; *Melms v. Pfister*, 59 Wis. 186. In *Gibbs v. Shaw*, 17 Wis. 197, where an administrator's sale of land was challenged, the sale was held void, because the record failed to disclose any notice to the heirs at law of the time and place of the hearing of the application for leave to sell. In this case the giving of the notice of the time and place of proving the will, as required by statute, was necessary to give the county court jurisdiction to bind the parties in interest. Unless we can say from the record itself and the proof offered that such notice, in fact, was given, the judgment of the circuit court cannot be sustained.

The will of Reynolds was presented to the county judge for probate on June 6, 1891. On that day the judge made an order fixing the time and place for hearing proofs of its due execution. F. M. Lawrence appeared as attorney with *Mrs. Heminway*. On the hearing in circuit court, the former testified that he was present on July 3d, and remembered getting money from *Mrs. Heminway*, which he paid to one of the printers of the Dodge County Volksfreund for printing notice of the proof of the will of Reynolds; that an affidavit of the publication of the notice was made out and filed by him with Judge Lamoreux; and that he did not pretend to remember the contents of the notice. *Mrs. Heminway* testified that she gave Lawrence money to pay the printers' fees, and she thought she remembered seeing the notice in the paper, but did not know what kind of a notice it was that she saw. This is substantially all the testimony to be found in the case relating to the notice. It will be noted that no proof was offered as to the contents of the notice or the length of time it was published. It is sufficient, however, to support the finding of the trial court that *a* notice was published.

We are left to deal with the substance of the notice on the basis of inference. These inferences must be derived

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from the state of the record, and the recitals found in the papers and documents on file. In the order for hearing proofs of the will we find the following: "It is ordered that the proofs of said instrument be heard before the judge of this court on *Saturday*, the 3d day of July, A. D. 1891," etc.; also, "and it is further ordered that public notice thereof be given to the heirs at law of said deceased, and to all other persons interested, by publishing a notice according to law for three successive weeks," etc. The proceedings were had before the county judge on *Friday*, July 3d, instead of *Saturday*, which was the 4th and a legal holiday. The caption of the decree allowing the will is as follows: "At a general term of county court within and for the county of Dodge, and begun and held at the office of the county judge on the 1st Saturday of July, A. D. 1891, to wit, this 3rd day of July, 189 ." In the body of the decree is found the following recital: "And it appearing that due notice of the time and place of such hearing has been duly given, as required by the order of the court herein made on the 6th day of June, A. D. 1891." The decree bore date "July 3d, 1891." It is not claimed that the order for hearing the proofs of will was published as is sometimes the practice, but that some kind of a notice was printed, presumably a notice in conformity with sec. 4050, R. S. 1878. So far as material to this discussion, the form of the notice prescribed by this statute reads as follows: "Notice is hereby given that at the —— term of the county court to be held . . . in said county, on the first Tuesday of ——, A. D. 18—, the following matter will be heard and considered," etc.

We have referred to these matters at length because the contention has arisen that the recitals in the record, with the proof offered, are sufficient to sustain the findings of the circuit court. Unsupported by the record, the evidence is entirely insufficient to support a finding that a proper and legal notice was given — First, because it fails to disclose anything

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regarding the contents of the notice, and this is material because of the mistake in the order naming the *day* of the hearing as Saturday, July 3d, instead of Friday; second, because it fails to show that the notice, whatever it was, was published for three successive weeks. The authorities are uniform that, in proceedings of this kind, the requirements of the statute as to obtaining jurisdiction must be followed with a reasonable degree of strictness. It is also true that, in an action like this directly attacking the proceeding of the court by which it claims to have attained jurisdiction, there is not the same liberality of intendment to support the proceeding as in cases where it comes in review collaterally. If the recitals in the decree allowing the will had said that notice had been given according to law, or had used words of similar import, we should not hesitate to support the jurisdiction of the county court. Such recitals would import a compliance with statutory requirements. But the decree in question is quite imperfect in this respect. It says substantially, that notice has been given as required by the order of June 6, 1891. Turning to that order, we find the date of the hearing fixed as *Saturday*, July 3d. We know that Saturday was July 4th, and a legal holiday upon which the court could do no work. We find, further, that the order directs a publication of a notice "according to law." Upon reference to the form of the notice prescribed by law, we discover that no day of the month is mentioned in it, and that such hearings are usually advertised for some designated Tuesday of each month. We are thus driven to the inference either that the notice published fixed the day of hearing on the first Saturday of July, or that it fixed said date as mentioned in the order, on "Saturday, the 3d day of July." The court is unanimous in the opinion that a notice of either kind would be deceptive and misleading.

As before remarked, in proceedings of this kind, which involve the disposition of large property interests and the

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settlement of large estates, the requirements of the statute must be followed with a reasonable degree of strictness in the attempt to secure jurisdiction. Jurisdiction cannot be supported upon doubtful and uncertain inferences. If the notice in question followed the order fixing the date of hearing, the conclusion that a person glancing at it might easily be deceived or misled is too plain for argument. If the time fixed was the first Saturday in July, the notice was clearly illegal. The deductions to be drawn in either case are not helped out by the parol evidence in the case.

We are not unmindful of the rule that, where the jurisdiction of a matter depends upon the existence of certain facts which the court has authority to determine, its finding thereon is final and conclusive until reviewed in a direct proceeding. In this case the county court had undoubted jurisdiction to hear proofs of the will, but it had no jurisdiction to bind parties in interest unless it secured that right in the manner provided by statute, or it was waived. When the day of hearing arrived, the court might determine for itself whether it had a right to proceed to bind all parties in interest; but that decision is not conclusive, unless supported by the facts. Much greater latitude of intendment is indulged in to support the jurisdiction of such courts when the matter comes up collaterally than in a case where a direct attack is made. In absence of proof of facts upon which the question of jurisdiction rests, no intendments in favor of jurisdiction can be indulged in except such as are supported by the record, if the record attempts to deal with that question. As we have already seen, the record in this case tends rather to confuse than to aid in the solution of this question. We cannot give our assent to the support of proceedings so manifestly irregular, deceptive, and misleading as are shown by the records in this case.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to affirm the order of the county court.

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GALLAGHER, Respondent, vs. MJELDE, Appellant.

February 8 — March 1, 1898.

Married women: Contracts: Separate estate: Parties.

1. A married woman who has no separate estate or property of any kind and is not engaged in any kind of business cannot make a binding contract to repay money loaned to her to enable her husband, or herself and husband, to go into business.
2. Under sec. 2608, S. & B. Ann. Stats. (providing that "where a married woman is a party, her husband *must* be joined with her, except that, when the action concerns her separate property or business, . . . she may sue or be sued alone"), it was error, in a case not within the exception, to allow an action against husband and wife to be discontinued as against the husband only.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

For the appellant there was a brief by *D. H. Sumner*, and oral argument by *Mrs. T. M. Sumner.*

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *E. Merton.*

CASSODAY, C. J. This action was commenced in March, 1896, against the defendant *Mrs. Mjelde* and her husband, H. J. Mjelde, to recover $500, with interest at six per cent. from April 16, 1893.

The original verified complaint alleged, in effect, that April 16, 1892, at the special instance and request of *Mrs. Mjelde*, the plaintiff loaned to her $500, said defendant to secure the same by a promissory note executed by herself and her husband as joint makers, payable three years from said date, with interest annually at six per cent. per annum; that a note was then drawn and executed by Mr. Mjelde, and delivered to the plaintiff without the signature of *Mrs. Mjelde*, of which the following is a copy:

"$500.00. April 16th, 1892.

"On or before three years after date I promise to pay to

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the order of *Katie Gallagher* five hundred dollars, at 225 Main street, Waukesha, Wis., for value received, without defalcation or discount, with interest from April 16th, 1892, at the rate of (6) per cent. per annum until paid.

"No. 0. .....

"H. J. MJELDE."

The complaint also alleged that the plaintiff did not discover the omission for some time thereafter; that when she did she immediately requested *Mrs. Mjelde* to sign the same, as agreed; that she failed and neglected to do so, but promised that she would see that it was paid when due; that she was a sister of the plaintiff, who relied upon such promise, and retained the note as originally delivered to her, and always had relied upon *Mrs. Mjelde* for such payment, which she was personally liable for; that no part of the note had been paid, except the interest to April 16, 1893; that there was due and owing to the plaintiff from the defendants by reason of such premises $500, with interest thereon from April 16, 1893, at six per cent. per annum; that when the note became due and payable, April 16, 1895, payment thereof was duly demanded of the defendants, and the same was refused by them.

The complaint prayed judgment against both defendants for the amount of the principal and interest.

The defendants, by an answer verified by both of them, jointly, admitted and alleged, in effect, that they were then, and at all times in the complaint named, husband and wife, and that the plaintiff was the sister of *Mrs. Mjelde;* that April 16, 1892, the plaintiff loaned to Mr. Mjelde $500, and took for such loan the note mentioned, and which was still due and unpaid, but for which *Mrs. Mjelde* was in no way bound or responsible; that they denied each and every allegation in the complaint contained not therein specifically admitted.

Upon the trial of the action, counsel for the plaintiff was

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allowed, against the objection and exception of the defendants, to dismiss the complaint so far as Mr. Mjelde was concerned, and to amend the complaint accordingly, and by surrendering the note into court. The complaint, so amended, was substantially as stated. Thereupon the defendant, *Mrs. Mjelde*, for another and further verified answer and defense, alleged, in effect, that she was then, and at all times named in the complaint, a married woman, living with her husband,—one of the original defendants in this action,—in this state; that she had not, at the times named in the complaint, a separate estate or property, and was not then, never had been, and was not at the time of such trial, engaged in any separate business of her own.

At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed her damages at $595.58. From the judgment entered thereon the defendant *Mrs. Mjelde* appeals.

The plaintiff testified to the effect that in pursuance of a prior conversation with the defendant at which she had agreed to loan her the money to be secured by a note signed by herself and her husband, she took the $500 to the defendant's house, April 16, 1892, and laid it on the table; that the defendant's husband was present; that she supposed they picked it up, of course; that she did not remember which of the parties picked it up first, nor which of them picked it up; that the defendant then was married and lived with her husband; that she had not at that time any separate estate, nor any property of any kind, and was not engaged in any business of any kind; that she understood that the defendant or her husband was going into business, and that the defendant was to give her husband the money to do it with; that they had told her that they were going into the hotel business, and that she loaned the money to the defendant for the purpose of enabling her to go into the hotel business, as she had thus stated; that the defendant's husband

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gave her the note a day or so afterwards; that she did not discover that it was not signed by the defendant until a year afterwards; that he paid the first year's interest on it; that August 29, 1893, the father of the plaintiff and defendant died testate; that after his death the defendant was interested in his estate as heir at law, but not otherwise. Thus, it is admitted that, at the time of the alleged loan, the defendant had no estate nor property of any kind, and that she was not engaged in any kind of business. The most that plaintiff's evidence tends to prove in her favor is that she made the loan to enable the defendant's husband, or herself and husband, to go into the hotel business some time thereafter. The defendant testified to the effect that she never had any conversation with the plaintiff about borrowing money; that she heard a conversation between her husband and the plaintiff, in which he said he would like to raise $500 and go west; that the plaintiff offered to loan him the money; that he offered to secure her by a mortgage on their furniture, to which the defendant objected; that the plaintiff then said that she did not want any mortgage, and that was all she heard at the time; that she never received any of the estate of her father, and had no separate estate or property or any business at the time of the trial.

Viewing such evidence in the most favorable light for the plaintiff, it seems to be insufficient to support the verdict, upon the principles of law applicable to the case. Besides, the court overruled a demurrer *ore tenus* to the complaint. That complaint contains no allegation or statement from which it can be inferred that, at the time of making the alleged loan, the defendant had any separate estate or property, or that she was in business or contemplated going into business. The most that is alleged is that, at the special instance and request of the defendant, the plaintiff loaned to her $500, to be secured by a note to be executed by herself and husband, but is entirely silent as to what was to be done

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with the money. Of course she would not be bound at common law, and the facts alleged do not bring her within any of the provisions of our statute enabling her to make a binding contract. True, our statute authorizes a married woman to receive property "from any person other than her husband, and hold" the same, "to her sole and separate use," and to dispose of the same. R. S. 1878, sec. 2342. So, she is entitled to her "individual earnings" in certain cases. Id. sec. 2343. So, in case of certain conditions as to her husband, she has "the right to transact business in her own name, and to collect and receive the profits of such business, her own earnings and the earnings of her minor children in her charge or under her control, and apply the same for her own support and the support and education of such children." R. S. 1878, sec. 2344. So, the statute has expressly authorized her to sue in her own name, and "have all the remedies of an unmarried woman in regard to her separate property or business, and to recover the earnings secured to her by" the statutes cited, and has provided that she "shall be liable to be sued in respect to her separate property or business." S. & B. Ann. Stats. sec. 2345. These statutes, undoubtedly, give to married women such implied powers as are necessary or convenient to carry into execution the rights and powers thus conferred.

The furthermost this court has gone, in the direction of supporting this action, is to hold that a married woman, having no separate estate, may acquire such estate by purchasing property of any person other than her husband, entirely on credit, and thereby make herself liable for the contract price in an action at law. *Dayton v. Walsh*, 47 Wis. 113; *Krouskop v. Shontz*, 51 Wis. 204; *Cramer v. Hanaford*, 53 Wis. 85; *Bouck v. Enos*, 61 Wis. 660. The principles involved are fully covered by the reasons given and authorities cited in these cases and the more recent cases, and hence it is unnecessary to repeat them. *Fuller & Fuller Co. v. Mc-*

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Henry, 83 Wis. 573; *Gaynor v. Blewitt*, 86 Wis. 399; *Mueller v. Wiese*, 95 Wis. 381; *Franke v. Neisler*, 97 Wis. 364.

The statute is imperative that, "where a married woman is a party, her husband *must* be joined with her, except that, when the action concerns her separate property or business, . . . she may sue or be sued alone." S. & B. Ann. Stats. sec. 2608. Since the case does not come within the exception, it is obvious that the defendant could not be properly sued without joining her husband, and hence it was error to allow the plaintiff to discontinue the action as against the husband.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

LARDNER, Respondent, vs. WILLIAMS and others, Appellants.

February 9 — March 1, 1898.

Wills: Construction: Power to mortgage: Conveyance by person having both an interest and a power: Reformation: Judgment.

1. By his will a testator, who left a very small amount of property and a very large family, gave all his property to his wife, to be used and held by her for her own support and the support and education of their minor children until they should become of age, and until she should die or remarry, the balance of said estate at her death or remarriage to be divided among the children. The will stated that it was expressly intended that the wife should have the full right and power to hold the property and the testator's business, and carry on the same, in the same manner as he could do were he living, and that she should have the right to sell and dispose of any and all of the property as she might deem best for the use and purposes aforesaid. *Held*, that the will gave her power to mortgage the property as well as to sell and convey it. [Whether a simple power of sale will authorize a mortgage, not determined.]

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2. The common-law rule that where a person has both an interest and a power, a conveyance by him which contains no apt words indicating an intent to exercise the power will be held to be merely a conveyance of the interest, and not an execution of the power, was not changed by sec. 2149, R. S. 1878, providing that "every instrument executed by the grantee of a power, conveying an estate or creating a charge, which such grantee is authorized by the power to convey or create, but which he would have no right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein."
3. A mortgage, executed by a life tenant who was also vested with a power to mortgage the fee, which did not refer to the power and therefore covered only the life estate, may be reformed so as to cover the fee, where both parties thereto intended and agreed that the fee of the land and not the mere life estate should be mortgaged, and supposed that a mortgage in the usual form would be a valid mortgage of the fee under the power.
4. A judgment in such a case, based on findings authorizing a reformation, which foreclosed the mortgage and ordered a sale of the fee, in all respects as though the mortgage had been reformed, but contained no provision specifically reforming it, was substantially a judgment of reformation.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

This is an action to reform and foreclose two certain mortgages upon the same parcel of real estate. The mortgages, amounting to $2,000, were executed by the defendant *Lucina H. Williams* to H. K. and B. G. Edgerton, assignors of the plaintiff, and were in the usual form, purporting to mortgage the fee of the premises, and were signed simply *Lucina H. Williams.* The mortgaged premises were originally the property of one William P. Williams, the husband of Lucina, who died in March, 1881, testate, and the plaintiff claims that the mortgages should be reformed so as to show that they were executed by *Lucina* under a certain power given her in the will of said William P. Williams. The defendants deny that they were executed under said

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power, and claim that only the life estate was covered by said mortgages for the life of said *Lucina.*

The court found, after trial of the action, that William P. Williams died leaving surviving his widow and eleven children, the oldest being about twenty-five years old and the youngest four years old at the time of the father's death; that he then owned the real estate mortgaged, and left a last will, which was duly probated, and which contained the following clause:

"Secondly, I hereby give, devise, and bequeath unto my wife, *Lucina H. Williams*, all the rest and residue of my estate (after the payment of my debts, as aforesaid), to be used and held by her for her own support, and for the bringing up and educating and support of all my minor children until they shall severally become of age (twenty-one years), and until my said wife shall depart this life, unless she shall sooner marry; and at her death the balance of my said estate shall be divided among all my children, equally shared and share alike; and in case of her marriage, then, and in that event, such division of my said estate shall be then made as aforesaid; but in no event shall any such division of my said estate be made until all my said children shall have arrived at the age of twenty years. It is hereby expressly intended by me in this will that my said wife shall have the full right and power to hold my said property and my business, and carry on the same, in the same manner and in accordance with her own judgment and discretion, as I could and would do were I living and present in and about the same. Further, that she shall also have the right to sell and dispose of all and singular of any and all of my said estate, both real and personal, in manner and as she may in her own judgment deem best for supporting herself and family, aforesaid, and carrying on and management of said business, or any other proper business, for said purposes, during the time she may hold and use the same, and

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my said wife shall have and hold all my said estate and dispose of any part thereof for the aforesaid use and purposes, and shall have full and complete power and authority to sell and convey the whole or any part thereof."

The court further found that the real estate in question was the homestead of the deceased, and continued to be the home of *Lucina* and the minor children after the death of said Williams; that *Lucina* and the minor children had no other property except the property left by the deceased, and that the income therefrom was small and insufficient for the support of the family and the education of the children, so that it became necessary for *Lucina* to raise money out of the real estate left by the husband for the support of herself and the support and education of the children, and that she was obliged to dispose of nearly all of the estate, except the land described in the mortgages, for such purposes; that, before the execution of the mortgages in question, she raised the money necessary for her support, and the support and education of the children, by mortgaging the land in question, and that said mortgages were released and became merged in the mortgages described in the complaint; that, at the time of the execution of the mortgages described in the complaint, she had been trying to sell said premises to raise money necessary for her support and that of the family, and had been unable to sell the same except at a sacrifice, and that she thereupon executed the mortgages in question for the purpose of raising the money necessary for her support and the support and education of the minor children, and that the consideration of said mortgages was paid to her for such necessary support and education, and so used by her; and, further, that said mortgages were executed and delivered with the intent by all parties to mortgage and convey the fee in said lands as well as the life estate of said *Lucina* under the power given in said will, and that the value of said real estate did not exceed $3,500. It was further found that said *Lucina* has remained unmar-

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ried since the death of her husband, and that all the allegations of the complaint were true, and that said mortgages were effectual to mortgage the fee of said premises, and that the plaintiff was entitled to the relief demanded in the complaint.

Upon these findings, judgment of foreclosure and sale was rendered adjudging sale of the fee of the premises as against the defendant *Lucina* and the remaining defendants, consisting of the children of said William P. Williams. From that part of the judgment adjudging that the fee of the premises be sold instead of the life estate of *Lucina*, the defendants appeal.

C. H. Van Alstine, for the appellants.

John A. Kelly, for the respondent, argued, among other things, that under the will the widow had power to mortgage. *Jones v. Jones*, 66 Wis. 310; *Croft v. Bannister*, 9 id. 503; *Marvin v. Titsworth*, 10 id. 320; *Downey v. Bissell*, 4 Fed. Rep. 55; *Giles v. Little*, 13 id. 100; *McCreary v. Bomberger*, 151 Pa. St. 322; *Henderson v. Smith*, 62 Fed. Rep. 708; 2 Washburn, Real Prop. (4th ed.), 655; 18 Am. & Eng. Ency. of Law, 942; *Gordon v. Preston*, 1 Watts, 385; *Waterman v. Baldwin*, 68 Iowa, 255; Perry, Trusts (4th ed.), § 768; *Loebenthal v. Raleigh*, 36 N. J. Eq. 169; *Kent v. Morrison*, 153 Mass. 137; *Lancaster v. Dolan*, 1 Rawle, 231; *Duval's Appeal*, 38 Pa. St. 112; *Pennsylvania Co. v. Austin*, 42 id. 257; *Zane v. Kennedy*, 73 id. 182; *Watts's Appeal*, 78 id. 370; *Maurer's Appeal*, 86 id. 380; *Campbell v. Foster Home Asso.* 163 id. 609; Hill, Trustees, 475; *Stroughill v. Anstey*, 1 De Gex, M. & G. 635; *Page v. Cooper*, 16 Beav. 396; *Ball v. Harris*, 4 Mylne & C. 264; *Adams v. Rome*, 59 Ga. 769; *Colesbury v. Dart*, 61 id. 620; *Starr v. Moulton*, 97 Ill. 525.

WINSLOW, J. The findings of fact were fully proven by clear and satisfactory evidence, and it is not deemed necessary or profitable to review the evidence to demonstrate

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that it supports the findings. The questions remaining for consideration are purely legal, and are two in number, viz.: (1) Did the power given in the will to the widow, *Lucina*, authorize her to mortgage the premises? and (2) If the power to mortgage was granted by the will, then was such power exercised by the execution of mortgages which contained no reference to the power? and, if it was not, could such mortgages be reformed and made effective as valid mortgages upon the fee under the power?

1. The widow was left with a very small amount of property and with a very large family to support. It clearly appears by the will that the testator intended that his widow should have a life estate during widowhood in all the property, and that she should also be clothed with power to use and dispose of all the property left in carrying on a small mercantile business and supporting herself and educating the children, as fully as the testator could do if living. This was really necessary, under the circumstances, and in fact was the only reasonable provision which could be made for her, in default of giving her an absolute fee. The question is, What is the proper construction to be given to the provisions of the will, construing it all together, and giving effect to the manifest intent of the testator as shown by the will, in the light of the surrounding circumstances. *Hopkins v. Holt*, 9 Wis. 228; *Eastman's Estate*, 24 Wis. 556; *Lovass v. Olson*, 92 Wis. 616. Applying this test to the will in the present case, we can entertain no doubt that the intent of the testator was to give his widow power to mortgage the property as well as to sell and convey it. Otherwise she might not be able to educate and support the children, and would not have that full right and power "to hold the property and business" and carry on the same in the same manner as the testator could do if living, and the clear intent of the testator would be defeated. *Kent v. Morrison*, 153 Mass. 137, 10 L. R. A. 756. In so holding, we are

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not to be understood as holding that a simple power of sale will authorize a mortgage. This is a question upon which the decisions are not uniform. See Perry, Trusts (4th ed.), § 768; 18 Am. & Eng. Ency. of Law, tit. "POWERS," 940, note 2. We simply construe the language of this will as giving the power to mortgage.

2. The power being established, we proceed to the second question, which naturally divides itself into two questions, namely: Were the mortgages on their face a valid execution of the power? and, If not, was a case made for their reformation, so as to be valid under the power?

The widow had a life estate during widowhood, and a power of sale over the same land. The well-established rule at common law is that where a person has both an interest and a power, a conveyance which contains no apt words indicating an intent to exercise the power will be held to be merely a conveyance of the interest, and not an execution of the power. 4 Kent, Comm. 334, 335; Sugden, Powers, ch. 6, sec. 8; *Mut. L. Ins. Co. v. Shipman*, 119 N. Y. 324. This rule was recognized and adopted in this state in case of a quitclaim deed made by a life tenant who had a power to convey the fee. *Towle v. Ewing*, 23 Wis. 336. It might seem that this rule was changed by sec. 2149, R. S. 1878, which is the same as sec. 51, ch. 85, R. S. 1858, and reads as follows: "Every instrument executed by the grantee of a power, conveying an estate or creating a charge, which such grantee is authorized by the power to convey or create, but which he would have no right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein." The same statutory provision, in substance, exists in New York, and the court of appeals of that state, in passing upon it in a case almost identical with the one at bar, held that the statute was intended "to provide that, whenever a single power exists under which a grantor may

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convey or mortgage real estate, his conveyance is attributable to the exercise of the power," but that it was not intended thereby to change the long-existing rule that, if a grantor possessed an interest as well as a power, his mere conveyance, without reference to the power, would be held to apply only to his interest. *Mut. L. Ins. Co. v. Shipman, supra.* Such, also, is the apparent effect of the decision of this court in the case of *Towle v. Ewing, supra,* although the statute was not referred to in that case. We are content to adopt this construction, and therefore hold that the mortgages, upon their face containing no reference to the power, only cover the life estate of *Lucina H. Williams.*

This conclusion, however, does not preclude the possibility of reformation of the instruments as between the parties, if a proper case for reformation be made. Such an instrument is fully as susceptible to reformation as any other conveyance, where no rights of third persons have intervened. If the understanding was that the mortgages should be executed under the power granted by the will, and should cover the fee, and by mistake or ignorance of the scrivener they were not made in the proper form to carry out the agreement, then a court of equity has power to reform and enforce them as contemplated and agreed by the parties. Such errors as these are very frequently corrected by a court of equity, and there have been marked examples of the exercise of this beneficent power by this court. *Green Bay & M. Canal Co. v. Hewitt,* 62 Wis. 316; *Silbar v. Ryder,* 63 Wis. 106; *Whitmore v. Hay,* 85 Wis. 240; 2 Pomeroy, Eq. Jur. § 845.

In the present case it was conclusively shown, not only by the circumstances but by direct evidence, that both mortgagor and mortgagees intended and agreed that the fee of the land should be mortgaged, and not the mere life estate, and that they knew that the power to mortgage came from the provisions of the will, and that they supposed that a

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mortgage in usual form would be sufficient to make a valid mortgage on the fee under the will. No lawyer was consulted, but one of the mortgagees drew the papers, and did not suppose it necessary to recite the power, but thought an ordinary mortgage would be sufficient. If a court of equity could not relieve the mortgagee under such circumstances, and make the agreement what it was intended to be, it would be a reproach to the law. The court found that the intent of the parties was to execute the power and mortgage the fee, and that by mistake the papers were drawn without reference to the power, and that the plaintiff was entitled to the relief prayed in his complaint, a part of which consisted in the reformation of the mortgages.

We do not find that the judgment contains any provision specifically reforming the mortgages, but it adjudges foreclosure and sale of the fee in all respects as though the mortgages were reformed, and we regard this judgment, under the findings, as amounting substantially to a judgment of reformation.

By the Court.— Judgment affirmed.

McCORMICK, Plaintiff in error, vs. CLEVELAND, Defendant in error.

February 10 — March 1, 1898.

Justices' courts: De facto *officer: Presumptions: Collateral attack.*

Where there is the office of justice of the peace in a municipal corporation, and a judgment rendered by a person purporting to act as such justice, in the absence of evidence to the contrary it will be presumed, in favor of such judgment, that the person so acting was in possession of the office, hence at least a *de facto* justice, and the judgment not open to collateral attack.

[Syllabus by MARSHALL, J.]

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McCormick vs. Cleveland.

ERROR to review a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

For the plaintiff in error there was a brief by *Sheridan & Evans*, and oral argument by *W. L. Evans.* To the point that the circuit court will take cognizance of who are justices of the peace in the county where the court is held, and of who are incumbents of offices under general statutes, they cited Bradner, Ev. (1st ed.), 92; 1 Rice, Ev. 26, and cases cited; 12 Am. & Eng. Ency. of Law, 179, and cases cited.

For the defendant in error there was a brief by *Calkins & McGruer* and *Sol. P. Huntington*, and oral argument by *L. A. Calkins.*

MARSHALL, J. The record returned to this court discloses a judgment against the defendant [plaintiff in error], rendered before one William Hood, as justice of the peace of the city of Green Bay, an appeal in due form from such judgment to the circuit court for Brown county, and, as the result of the trial in the circuit court, a judgment for plaintiff [defendant in error] for $80 damages and $35 costs. There is no bill of exceptions, therefore the writ of error brings here, properly, only the judgment and the pleadings, verdict, orders, and papers on which it was based and which affect it. *Donkle v. Milem*, 88 Wis. 33. Affidavits, orders, and proceedings after judgment do not affect it, form no part of the record in the absence of a bill of exceptions making them such, and cannot be considered, though included in the return to the writ of error.

The sole question for discussion on the record, as we find it, is, Does it support the judgment? The ground upon which plaintiff in error contends it does not, is that the case came to the circuit court by appeal from a judgment rendered by William Hood, pretending to act as justice of the peace of the city of Green Bay, but that the circuit court acquired no jurisdiction because Hood was not such justice, and was

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not in possession of the office of justice of the peace of such city, therefore neither a *de facto* nor a *de jure* officer; that he was elected justice of the peace of the city of Ft. Howard, which ceased to exist as a corporation as a result of a vote on the question of its annexation to the city of Green Bay; that the charter of the city of Green Bay provides for three justices of the peace, and that there were duly elected and qualified justices in possession of all the offices at the time Hood pretended to act in the rendition of the judgment in question; but such facts, if they exist, do not appear by the record.

If Hood was a *de jure* or a *de facto* justice of the peace, his jurisdiction for the purposes of this case was complete. There was such an office as justice of the peace of the city of Green Bay. The record shows that Hood rendered the judgment pretending to act as such justice. In the absence of evidence to the contrary it must be presumed in favor of his acts that he was in the actual possession of the office, the duties of which he assumed the right to perform. Such facts constitute all the essentials of a *de facto* officer. Therefore, it conclusively appears, looking to the record alone, that Hood was at least a *de facto* officer, and hence his acts as such are not open to collateral attack. *In re Boyle*, 9 Wis. 264; *Laver v. McGlachlin*, 28 Wis. 364. This appears to be all that need be said in deciding this case. The question presented involves a proposition the decision of which turns on a principle so elementary that any discussion of the subject appears to be unnecessary.

By the Court.— Judgment affirmed.

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WINDROSS, Respondent, vs. McKILLOP and another, Appellants.

February 10 — March 1, 1898.

Appeal: Failure to apply for correction of manifest error: Costs.

An appeal from a judgment of foreclosure on the sole ground that it provides that the amount due thereon shall bear interest at a rate in excess of the minimum legal rate, in violation of sec. 3164, R. S. 1878, as amended by ch. 303, Laws of 1891, is without merit where the attention of the trial court was not called to the obvious mistake; and on reversal of the judgment, as required by Supreme Court Rule XXXII, no costs will be allowed except that respondent will be required to pay the fees of the clerk of this court.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed in part; reversed in part.*

The plaintiff commenced this action to foreclose a mortgage executed by the defendant *McKillop*. Personal service was had on all of the defendants. The defendant *McKillop* suffered default, and the other defendants appeared but put in no answer. Due notice of application for judgment was given, and on December 21, 1896, judgment of foreclosure was entered. The note secured by the mortgage bore interest at eight per cent. per annum, and, by inadvertence, plaintiff's attorney included a provision in the judgment that the amount due thereon should bear interest at that rate. Defendants *McKillop* and the *Holt Lumber Company* appeal from said judgment.

For the appellants the cause was submitted on the briefs of *Reinhart & Trudell.*

For the respondent there was a brief by *Morrow & Lynch*, attorneys, and *Sheridan & Evans*, of counsel, and oral argument by *W. L. Evans.*

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BARDEEN, J. Sec. 3164, R. S. 1878, as amended by ch. 303, Laws of 1891, provides that the amount adjudged to be due in any judgment for the foreclosure of a mortgage shall draw interest at the rate provided to be paid on the mortgage debt, *but shall not exceed the minimum legal rate of interest.* Sec. 1688, R. S. 1878, as amended by ch. 61, Laws of 1893, fixes the minimum rate of interest at six per cent. It was therefore error for the plaintiff to include any greater rate of interest in the judgment than six per cent. It was error, however, which the trial court would have corrected on mere suggestion, had its attention been called to it, and would thus have saved all parties the expense of an appeal to this court. The failure to do so leaves the appeal without merit. Rule XXXII of this court, however, requires us to reverse the judgment.

By the Court.—That portion of the judgment requiring eight per cent. interest on the amount found due is reversed, and the cause is remanded to the circuit court with directions to so modify the judgment as to bear interest at the legal rate. No costs will be allowed except that respondent must pay the fees of the clerk of this court. The remainder of the judgment is affirmed.

COOK, Appellant, vs. MCCOMB and others, Respondents.

February 10—March 1, 1898.

Ejectment: Invalid tax title: Rights under tax deeds obtained subsequent to trial: New trial: Estoppel.

1. Sec. 3087, S. & B. Ann. Stats. (providing in effect that in ejectment, when plaintiff is entitled to recover by reason of the invalidity of any tax deed under which defendant claims title, he shall be required, except in certain cases, as a condition precedent to judgment in his favor, to pay to the defendant "the amount for which

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such land was sold, and the costs of executing and recording such tax deed, and the amount paid by the defendant for taxes assessed upon such premises subsequent to said sale, with interest on *all such sums* at the rate of twenty-five per centum per annum from the time so paid until the date of the verdict," subject to setoff), shows a legislative intent to have the judgment conclude all further controversy as to any claim by such defendant on account of any of such taxes. The propriety of allowing a new trial for the purpose of permitting the defendant to set up other tax deeds, based upon certificates of sales for subsequent taxes, where such certificates were held by him at the time of the trial, is therefore questioned.

2. A party is estopped to object to the granting of a new trial by accepting the costs imposed on the other party as a condition of granting it.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

W. H. Webster, for the appellant.

For the respondents the cause was submitted on the brief of *E. J. Goodrick*. He contended, *inter alia*, that it was not the duty of the defendants to pay taxes assessed upon the lands before they acquired an interest in them. There was nothing in the way of their taking tax deeds upon certificates of sales for taxes assessed prior to 1887. The first deed being invalid, they were at liberty to take other deeds. *Lybrand v. Haney*, 31 Wis. 230; 1 Blackwell, Tax Titles, §§ 567, 607; Cooley, Taxation (1st ed.), 349, 350; *Oswald v. Wolf*, 129 Ill. 200; *Eaton v. North*, 29 Wis. 75; *Hart v. Smith*, 44 id. 213.

CASSODAY, C. J. This is an action of ejectment to recover four forties of land, commenced by the owner of the original title, April 29, 1889, against the defendants, who answered, claiming title under and by virtue of a tax deed executed and recorded May 14, 1887, upon the tax sale of 1880 for the taxes of 1879. That action was first tried April 17, 1890, and on that trial the court made and filed findings May 2,

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1890, to the effect that the tax deed was valid. Subsequently the trial judge, having his attention called to the fact that he had overlooked certain documentary evidence, set aside such findings, and made and filed new findings June 2, 1890, to the effect that said tax deed was null and void on account of errors and defects in the proceedings on which it was based, not going to the validity of the assessment nor affecting the groundwork of the tax, and ordered judgment in favor of the plaintiff on condition that he pay to the defendants $67.87, with interest from June 2, 1890, within ninety days from that date, and, in default thereof, that the defendants have judgment dismissing the complaint, and that, upon payment of such an amount, judgment be entered for the plaintiff in accordance with such findings. Thereupon the defendants petitioned the trial court to set aside such findings, and for leave to file and serve a proposed supplemental answer, and for a new trial of the action. By such proposed supplemental answer the defendants claimed title to the premises, under and by virtue of three tax deeds executed and recorded April 22, 1890,— one on the tax sale of 1883 for the taxes of 1882, another on the tax sale of 1885 for the taxes of 1884, and the other on the tax sale of 1886 for the taxes of 1885.

Upon the hearing of such application, the trial court, June 30, 1890, ordered that such findings be, and the same thereby were, set aside, and a new trial awarded; that the defendants have leave to file their proposed supplemental answer on condition that the defendants pay the plaintiff's costs of action, to be taxed by the clerk, together with $10, costs of such motion. Thereupon the plaintiff accepted such costs, and the parties waived a jury and went to a second trial upon the issues made by the complaint and supplemental answer, April 27, 1891; and a few days thereafter the trial judge orally announced his decision in favor of the plaintiff. Thereupon the papers were delivered to the plaintiff's attor-

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ney to draw such findings. On March 21, 1894, such findings were completed and signed by the judge, and May 12, 1894, the same were modified, so that such findings, in addition to the facts stated, are to the effect that, at the time of the first trial, the defendants were jointly the owners of all of the tax certificates of sale of all of said lands for the several years of 1881 to 1888, inclusive, and that the same included the tax certificates upon which the three tax deeds of April 22, 1890, were issued; that each of the said tax deeds so taken and recorded April 22, 1890, was null and void, on account of the proven errors and defects in the tax proceedings on which they were, respectively, based, not going to the validity of the assessment, nor affecting the groundwork of the tax; that the plaintiff was and is the owner in fee simple, and entitled to the possession, of the premises described, and entitled to judgment establishing his title and possession, with six cents damages, and for costs, but not until he pays to the defendants $353.25; that upon the payment of that amount, with interest thereon at six per cent. per annum from March 21, 1894, within ninety days from that date, the plaintiff should be entitled to judgment as above determined; but that, in default of such payment within that time, the defendants have judgment therein. From the judgment entered thereon accordingly the plaintiff appeals.

The first trial took place April 17, 1890. The defendants at that time not only held the tax deed of May 14, 1887, issued upon the tax sale of 1880 for the taxes of 1879, but the tax certificates issued upon the sales for the several years of 1881 to 1888, inclusive. Five days after that trial the defendants obtained and recorded the three tax deeds mentioned in the supplemental answer, upon the certificates so held by them for the years 1883, 1885, and 1886. The propriety of allowing a new trial June 30, 1890, to enable the defendants to defend upon such new tax deeds, may well be questioned. The fact that when plaintiff recovers in such

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an action, upon the grounds stated, he is required, as a condition precedent to having judgment in his favor, to pay to the defendants "the amount for which such land was sold, and the costs of executing and recording such tax deed, and the amount paid by the defendant for taxes assessed upon such premises subsequent to said sale, with interest on *all such sums* at the rate of twenty-five per centum per annum from the time so paid until the date of verdict," subject to setoff, etc. (sec. 3087, S. & B. Ann. Stats.), pretty clearly shows a legislative intent to have such judgment conclude all further controversy as to any claim or claims by such defendant on account of any of such taxes. To allow such defendant, when beaten upon one tax deed, to take a new one, or several new ones, upon tax certificates held by him at the time, and then to have a new trial as to the validity of each of the new deeds, would defeat the very object of the statute. Of course, what is thus said has no reference to the absolute right to a new trial in actions of ejectment given by statute. R. S. 1878, sec. 3092.

But, upon the facts stated, the objection is not available to the plaintiff. The new trial was granted upon the express condition that the defendants should pay the plaintiff's costs in the action, together with the costs of the motion. By accepting such costs, the plaintiff is estopped from making any available objection to the granting of such new trial. *Cogswell v. Colley*, 22 Wis. 399; *Flanders v. Merrimac*, 44 Wis. 621; *Webster-Glover L. & Mfg. Co. v. St. Croix Co.* 71 Wis. 319; *Smith v. Coleman*, 77 Wis. 343; *McKinnon v. Wolfenden*, 78 Wis. 237; *Wirth v. Bartell*, 89 Wis. 596.

The findings to the effect that the aggregate amount which the plaintiff was required by sec. 3087, S. & B. Ann. Stats., to pay to the defendants, as a condition precedent to the recovery of possession of the land, was $353.25, seem to be sustained by the evidence. The statute authorized interest at the rate of twenty-five per cent. on the amount for

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which the lands were sold at the tax sales, and the cost of executing and recording such tax deeds, as well as the amounts paid by the defendants for subsequent taxes; and those are the only items to which exception is taken.

By the Court.— The judgment of the circuit court is affirmed.

HESSEY, Respondent, vs. GUND, imp., Appellant.

February 10 — March 1, 1898.

Contempt of court: Violation of injunctional order: Bond.

1. In contempt proceedings to punish a defendant in an action to foreclose a land contract for violation of an order forbidding the removal of logs from the land, the evidence is *held* to show that such defendant was the active moving party in violating the order, notwithstanding his statement that a corporation of which he was president, formed about the time the logs were removed, committed the act without his knowledge or consent.
2. The mere fact that a defendant signed and mailed to his attorney the bond required by an injunctional order as a condition of relief therefrom, does not relieve him from the charge of contempt in violating the order, where the bond never came to the knowledge or possession of the plaintiff, or his attorney, or the clerk of the court.

APPEAL from an order of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This is an appeal from an order adjudging the appellant guilty of contempt, under sec. 3477 *et seq.*, R. S. 1878, and requiring him to pay to the respondent a certain sum of money. The contempt charged and found consisted in the violation of a temporary injunctional order.

The action in which the order which was disobeyed was made was an action brought to foreclose a contract for the sale of pine lands. The lands were originally owned by one

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Snow, who made a contract to sell the same to the Iron River Lumber Company, and afterwards sold the lands and assigned his interest in the contract to the plaintiff, *Hessey*. The Iron River Lumber Company became insolvent, and the appellant, *Gund, Jr.*, purchased its rights under the contract in November, 1894. All the timber on the lands was cut either by the lumber company or by *Gund* prior to December 6, 1894; and on the 24th of January, 1895, there remained on the land upon skidways 1,500,000 feet of logs, worth $6,000, all of which *Gund* claimed to own. At this time there was due and unpaid on the contract $1,645.75, with interest, and for this sum the action of foreclosure was commenced on said 24th day of January. Simultaneously with the service of the summons, the plaintiff obtained and served on *Gund* and the other defendants an injunctional order restraining him and his agents and servants from removing any of the logs during the pendency of the action. *Gund* answered February 7th, claiming to own the logs, and on the same day moved, upon his answer and the affidavit of his agent, to dissolve the injunctional order, on the ground that he (*Gund*) would suffer great loss if the injunctional order were allowed to remain and he were not permitted to remove and sell the logs. The court denied the motion February 12th, but the order provided that it was "without prejudice to *Gund's* right to remove the timber described in the complaint upon execution of the proper bond to secure the unpaid balance price of said land."

On the 23d of January, 1895, a corporation called the John Gund Lumber Company was formed, of which *Gund* was president. Immediately after the order of February 12th was made, the timber was removed from the land as rapidly as possible. No bond was given by *Gund* prior to the removal of the timber, but, in March following, it appears that *Gund* (who lived in La Crosse) sent a bond in the sum of $2,000, with two sureties, to his attorney at Ashland; but

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the terms of the alleged bond do not appear, and it never came to the knowledge or possession of the plaintiff or his attorneys or the clerk of the court, and in fact was lost if it ever existed.

The foreclosure action was tried in December, 1895, and findings were made upon certain issues unnecessary to be stated, which also found the amount due the plaintiff on the contract as aforesaid, and that *Gund* had removed all the logs prior to March 1, 1895, in violation of the injunctional order, leaving the lands practically worthless. Judgment of foreclosure was ordered. No judgment was entered on the findings, but in September, 1896, the plaintiff moved, upon the record and affidavits, to punish *Gund* for contempt in disobeying the injunctional order. This motion was heard, *Gund* filing affidavits in opposition, setting forth the mailing of the lost bond and claiming that the removal of logs was done by the Gund Lumber Company and not by him. Thereafter the court found that *Gund* was guilty of contempt in removing the logs, and that such misconduct actually did defeat, impair, and impede the rights and remedy of the plaintiff in the action, and ordered that *Gund* pay to the plaintiff's attorneys the amount found due on the contract, viz. $1,645.75, with interest, and that he be imprisoned in default of payment. From this order, this appeal is taken.

For the appellant there was a brief by *Bleekman, Bloomingdale & Bergh*, and oral argument by *F. H. Bloomingdale.*

For the respondent there was a brief by *Lamoreux, Shea & Wright*, and oral argument by *C. A. Lamoreux.*

WINSLOW, J. We discover nothing in this case but a salutary exercise of the power of the court to compel parties litigant to obey its process. It is very clear that there was a bald violation of the injunctional order, and that such violation practically deprived the plaintiff of his security, and there was ample evidence to show that the appellant, *Gund*,

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was the active moving party in this violation of the command of the court, notwithstanding his present improbable statement that a corporation, of which he was president, committed the act without his knowledge or consent. The supposed bond can cut no figure, because it never was seen by any one after it was signed. It is well that parties to a serious litigation should learn and realize that the order of a court deliberately made cannot be treated lightly, or brushed aside as of no more importance than the conclusions of a debating society. It is to be hoped that the lesson has been well learned in this case.

By the Court.— Order affirmed.

SHORES LUMBER COMPANY, Respondent, vs. PATTERSON, Appellant.

February 10 — March 1, 1898

Contracts: Construction: Sale of lumber: Reservation in acceptance.

By a proposition in writing, made September 18, plaintiff offered to sell to defendant a quantity of lumber of specified dimensions "at $10 per thousand, straight measure, as now piled on their mill dock, or $12 per thousand" delivered at T., lake freights to be paid cash on delivery. The defendant was to accept by wire within two days. It was to be optional with defendant whether to give ninety days' paper or pay cash when the lumber was delivered. The defendant on the same day indorsed thereon the following: "I accept the above price as quoted on [plaintiff's] dock; will wire acceptance on balance contract 20th." On September 21 defendant wired plaintiff to "call off the trade made on the 18th." *Held*, that there was no completed contract, the reservation in the acceptance having been intended to afford opportunity for necessary examination or inspection of the character and quality of the lumber. MARSHALL, J., dissents, being of the opinion that such acceptance merely reserved to the defendant the right to say within two days whether he would pay $2 per thousand extra for delivery at T.

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APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This was an action for the recovery of damages claimed by the plaintiff in consequence of the refusal of the defendant to accept and pay for a certain quantity of lumber on the plaintiff's dock at Ashland, Wisconsin, alleged to have been purchased by the defendant of the plaintiff under the following proposition and acceptance, September 18, 1894:

"New York, Sept. 18th, 1894.

"Mess. *Shores Lumber Co.* per E. A. Shores, president, do offer to sell to *T. G. Patterson* one and one-half million of 8 and 10″, and one half million of 12″ and wider, at $10.00 per thousand, straight measure, as now piled on their mill dock, or $12.00 per thousand delivered on Ollie & McKeen's dock in North Tonawanda, lake freights to be paid cash on delivery. *T. G. Patterson* to accept this offer by Thursday or call it no trade. If accepted wire Mr. E. A. Shores at North Tonawanda, care of Humboldt & Bellinger. Terms, ninety days, or *T. G. Patterson's* option of six per cent. per annum for one third cash.

"[Signed] SHORES LUMBER CO.
"Pr E. A. SHORES, Pres.

"I accept the above price as quoted on Ashland dock; will wire acceptance on balance contract 20th.

"T. G. PATTERSON."

The plaintiff had, it appeared, the lumber in question on hand at its dock in Ashland, and was ready and willing to deliver the same to the defendant, but the defendant refused to accept the lumber, whereby the plaintiff alleged that he was compelled to sell the same at $8.50 per thousand feet, which was the most the plaintiff was able to obtain for the same after the defendant refused to accept it under the alleged contract. Plaintiff demanded damages for such refusal in the sum of $5,000 and costs.

The defendant answered, admitting that on September 18, 1894, at the city of New York, E. A. Shores, the plaintiff's

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president, and representing it, made to the defendant an offer in writing, dated that day, being the same instrument set forth in its complaint and designated as the contract therein between the plaintiff and the defendant; that the defendant concluded that, should he purchase the lumber, he would accept the proposition contained in the offer of the delivery of the same at Ashland at the price therein named, and accordingly indorsed upon said offer his acceptance of the price for delivery at Ashland, reserving the right to examine the lumber and notify plaintiff whether he would take it or not by the following Thursday, the 20th of the same month; that immediately after said offer, through his agent, the defendant did examine the lumber in question, and immediately notified the plaintiff that he would not take the same, and he never accepted the said offer.

At the trial before the court and jury, the defendant demurred to the complaint *ore tenus*, because it did not state facts sufficient to constitute a cause of action, and especially because it did not show any acceptance of the proposition. The court overruled the demurrer.

It appeared that the defendant was engaged in the lumber business, and had charge of a box factory in New York, and had bought considerable quantities of lumber at various times of the plaintiff at Ashland, and that James Madden acted as his agent at that place in buying lumber for him. Mr. E. A. Shores and the defendant met at the office of the latter, September 18, 1894, in the city of New York. At this time E. A. Shores, president of the plaintiff company, submitted to the defendant the written proposition of that date, and the defendant signed and delivered to him the acceptance at the foot of the same. It was shown that the plaintiff then had the quantities of lumber, and of the quality therein stated, on its dock at Ashland; and that Shores left New York the same night, and when he reached his home at Ashland he received telegrams and letters from the defendant, and among others a telegram dated September 21, 1894,

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from the defendant, addressed "To *Shores Lumber Company*, Care J. H. Madden: Call off the trade made on the 18th; see J. H. Madden. [Signed] *T. G. Patterson*," and that he received this telegram on the day of its date.

The difference between the contract price of the lumber and the price for which the plaintiff subsequently sold it was $3,885, for which, at the close of the evidence, under the direction of the court, the plaintiff had a verdict, the court having ruled that the written acceptance was an acceptance of the proposition so far as the quality of the lumber was concerned, the place of delivery, and the price; that the second clause of the offer, which reads, "Terms ninety days, or *T. G. Patterson's* option of six per cent. per annum for one third cash,"— was the portion that was left open by the terms of the acceptance; and that the clause, "will wire acceptance on balance of contract," referred to the clause as to the terms of payment.

Evidence was given showing that in the lumber trade, by the terms, "one and one-half million of 8 and 10″," and "one half million of 12″ and wider," eight and ten inch white pine, common boards, or twelve inch white pine, common boards, one inch thick, were meant; and that the term "straight measure as now piled on the mill dock," would mean the actual number of feet in the piles, without culling of any kind; that in the trade the expression, "ninety days, or *T. G. Patterson's* option of six per cent. per annum for one third cash," would mean his paper due in ninety days from the date of the inspection sheets at the time the lumber was shipped, leaving it optional to pay in ninety days' paper or cash when the lumber was delivered or payment fell due.

For the appellant there was a brief by *Lamoreux, Shea & Wright*, and oral argument by *C. A. Lamoreux*.

For the respondent there was a brief by *Cate, Sanborn, Lamoreux & Park*, attorneys, and *D. F. O'Keefe*, of counsel, and oral argument by *A. W. Sanborn*.

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PINNEY, J. We think that, when applied to the situation of the parties and the subject matter with which they were dealing, it is quite plain that the time for complete acceptance of the terms of the proposition, made by the plaintiff to the defendant, related, not merely to the comparatively inconsequential matter of securing two days' time for the defendant to determine whether he would make payment for the lumber in ninety days' paper at six per cent., or cash, when in fact he would not be under any obligation to make payment until delivery of the lumber, which would presumably afford him a reasonable time to determine that matter. It is evident, we think, judging from the data before us, that the reservation of a right to accept the offer within two days was with a view to make necessary examination or investigation in regard to matters much more material and important, such as securing an examination or inspection of the character and quality of the lumber, the subject of the proposed sale. The question of the quantity the defendant would purchase, the place where he would accept the delivery of it, and the price he would pay, in view of the state of the market, were all matters he could decide intelligently as soon as the written proposition was handed to him, as he in fact did. It was otherwise with respect to the character and quality of the lumber. It is well understood that purchases of lumber are conducted by brokers and agents who are usually at points where large quantities are bought and sold, and so are able to make prompt inspection of lots offered, and to report the character and quality promptly by telegram, so that intending purchasers may act understandingly and have a proper basis upon which to form a practical judgment. The delay in this case, it is clear, was not secured to enable the defendant to determine whether he would pay cash on delivery, or in ninety days' paper at six per cent. We are clearly of the opinion that there was no completed contract between the parties,

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and, as it was not shown that the defendant ever accepted or agreed to accept the lumber the plaintiff proposed to sell him, he had, therefore, a right to withdraw from the negotiations as he did by his telegram. The construction placed by the court upon the proposition and acceptance relied on was, we think, erroneous. The court, as requested at the trial, should have directed a verdict for the defendant.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

MARSHALL, J. I cannot concur with the conclusion arrived at in this case. To my mind the meaning of the written acceptance is plain and unmistakable. There was a written proposition to sell appellant a quantity of lumber, located on Ashland dock, at $10 per thousand on such dock, or delivered on the Tonawanda dock at $12 per thousand, in the latter case freight charges to be paid cash on delivery, terms ninety days, with permission to the purchaser of six per cent. per annum for one third cash, and to accept by wire to the seller at Tonawanda by Thursday after the date of the proposition. Such date was Tuesday, September 18, 1894. Appellant immediately wrote on the proposition and delivered the same to the respondent: "I accept the above, price as quoted on Ashland dock. Will wire acceptance on balance contract 20th." The punctuation is my own; there is none in the original. Now, to say that such acceptance referred only to the price on Ashland dock, and not to the proposal to sell generally, is to give it no significance whatever, and to convict persons, apparently experienced business men, of dealing in a manner not consistent with the way such persons would ordinarily be expected to deal. It must occur to a person reasonably trained in business operations that a mere acceptance of the price, leaving all other questions open, was not of sufficient importance to have been even thought of. Certainly, neither buyer nor seller would

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have deemed that of sufficient importance to have called for the formal indorsement in writing on the proposition. To my mind, the purpose clearly was to accept the proposition as made, reserving the right to say, within two days, whether the seller would be allowed two dollars per thousand to deliver the lumber on the Tonawanda dock. As the determination of that question required reasonable time to investigate as to current carrying charges by lake transportation, two days were reserved for that purpose. That construction gives reasonable significance to the acceptance. Lake freights are constantly changing, so it was most natural that a careful business man, before agreeing to pay two dollars per thousand for freight charges from Ashland dock to Tonawanda dock, would take a little time to investigate the subject of what others were charging for like service. With that in view, the purchaser wrote, "I accept the above, price as quoted on Ashland dock. Will wire acceptance on balance contract 20th." That is, by inference, very clearly, I will say by the 20th whether I will pay the additional two dollars for delivery on Tonawanda dock. If the language had been that, or, I will say by the 20th whether to deliver on Tonawanda dock, it would not have been more plain in my judgment. That is the view the trial court took of the contract. I think the judgment should be affirmed.

MASON, Appellant, vs. THE CITY OF ASHLAND, Respondent.

February 10 — March 1, 1898.

(1) *Appealable order.* (2) *Municipal corporations: Ashland city charter: Presentation of claims: Limitation of time for action by council: Appeal to circuit court.*

1. An order dismissing, on the ground of a want of jurisdiction, an appeal from the disallowance by the common council of a claim against a city, effectually terminated the proceeding and prevented

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a judgment from which an appeal might be taken, and hence is appealable under subd. 1, sec. 1, ch. 212, Laws of 1895.

2. Where a city charter provides that no suit on any claim or demand shall be brought against the city until the claimant shall have presented the same to the common council for allowance; that in case of a disallowance thereof the claimant may proceed by appeal to the circuit court within twenty days thereafter; that failure to pass on the claim within sixty days after presentation shall be deemed a disallowance; that the disallowance of the claim shall be conclusive and a bar to any action in court founded thereon unless appealed from within the time provided by the charter; that no suit of any kind on any claim of any character shall be brought against the city, but that the claimant shall proceed to enforce his claim by filing the same with the city clerk for the action of the common council thereon, and appeal therefrom in case of final adverse action as provided by the charter; that failure of the common council to pass upon the claim within sixty days from the time of such filing may be taken by the claimant as a disallowance of his claim; and that the council shall not consider any claim till it shall first have been examined and reported on by the comptroller, *held:*

(1) That the words "presented to the common council for allowance" and "filed with the city clerk for the action of the common council thereon" are synonymous terms and not affected by the requirement that the comptroller shall examine and report on claims before the consideration thereof by the council.

(2) That when a claim is filed with the city clerk for the action of the common council thereon, it is in legal effect presented to such council for allowance.

(3) That the sixty-day period of delay, which operates for the purposes of an appeal as a disallowance of a claim, commences to run as soon as the same is presented to the common council for allowance by filing the same with its clerk for its action thereon.

(4) That the word "may," in the provision to the effect that sixty days' neglect to pass upon a claim *may* be taken as a disallowance for the purposes of an appeal, and the word "may," in the provision to the effect that upon the disallowance of a claim the claimant *may* appeal, must be construed in a sense exclusive, so that when the right of appeal is perfected it must be exercised within the twenty days provided by the charter, or the claimant will be forever barred from prosecuting his claim in any court.

[Syllabus by MARSHALL, J.]

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Mason vs. The City of Ashland.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

July 18, 1896, plaintiff filed with the city clerk of the city of *Ashland*, for allowance by the common council of such city, a claim for moneys alleged to be due him from the city for services as a police officer. On the 8th day of February, 1897, the common council having failed to take final action, plaintiff appealed to the circuit court in the manner provided by the city charter. When the case was reached for a hearing in the circuit court, an order was entered, on motion of the defendant, dismissing the appeal for want of jurisdiction of the court, because the appeal was not taken within the time required by the city charter. This appeal was taken from such order.

For the appellant there was a brief by *Cate, Sanborn, Lamoreux & Park*, attorneys, and *D. F. O'Keefe*, of counsel, and oral argument by *B. B. Park.*

E. E. Brossard, for the respondent.

MARSHALL, J. The ground of the dismissal of the appeal being want of jurisdiction of the court, the order entered on such dismissal effectually terminated the proceeding. Motion costs might have been allowed and included in the order, but no judgment for costs was proper. *Felt v. Felt*, 19 Wis. 195; *Ketchum v. Freeman*, 24 Wis. 296; *Kingsley v. G. N. R. Co.* 91 Wis. 380. It follows that the order appealed from is one affecting a substantial right, terminating the action and preventing a judgment from which an appeal might be taken, hence appealable under subd. 1, sec. 1, ch. 212, Laws of 1895.

Appellant contends that the sixty-day period of neglect to act upon his claim, which, under the charter of the city of *Ashland*, had, for the purposes of an appeal, the effect of a final adverse determination by the common council, commenced to run when the claim was presented to the common

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council for action, after the investigation and report by the comptroller, and not, as the trial court held, when the claim was delivered by the appellant to the city clerk for action of the common council thereon. The determination of the controversy turns on the proper construction to be given to several sections of the city charter, contained in ch. 27, Laws of 1889. Such sections are substantially as follows:

Sec. 4, subch. VII. No action on any claim or demand shall be maintained against the city by any person, until such person *shall have presented his claim or demand to the common council for allowance*, and the same shall be disallowed in whole or in part, provided that failure to pass on the claim within sixty days after the presentation thereof shall be deemed a disallowance of such claim.

Sec. 5, subch. VII. The adverse determination of the council shall be conclusive, unless appealed from as provided in the next section.

Sec. 6, subch. VII. The claimant may appeal from the final adverse action of the common council on his claim, within twenty days after such action.

Sec. 13, subch. VIII. No suit of any kind, *on any claim of any character*, shall be brought against the city, but the claimant shall proceed *by filing his claim with the city clerk for the action of the common council thereon*, and appeal, in case of final adverse action, in the manner before indicated, provided that failure to finally act upon the claim, by the common council, for sixty days after the filing thereof, may be taken as a disallowance of the same.

Sec. 6, subch. V. No claim shall be considered by the common council, or reported to a committee, till it shall have been examined and reported on by the comptroller.

The judicial construction given by this court to the words, "claim or demand" as used in sec. 4, subch. VII, is that they include only the claims arising on contract. *Bradley v. Eau Claire*, 56 Wis. 168; *Kelley v. Madison*, 43 Wis. 638; *Jung*

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v. Stevens Point, 74 Wis. 547; *Sommers v. Marshfield*, 90 Wis. 59. The proper construction of the term, "any claim of any character," used in section 13, subch. VIII, as repeatedly held by this court, is that it includes contract and tort claims as well. *Sheel v. Appleton*, 49 Wis. 125; *Koch v. Ashland*, 83 Wis. 361; *Watson v. Appleton*, 62 Wis. 267. True, the latter section is out of its proper place in the charter, being in the chapter in regard to actions to recover penalties, etc., considered with reference to an orderly and logical arrangement of charter provisions, but its language is so broad, so plain, so unmistakable in meaning, as to leave no ground for reasonable contention that it refers to a particular class of claims and was not intended to include those mentioned in section 4, subch. VII. It includes claims and demands mentioned in the latter section, and all other claims as well. That was evidently the legislative purpose, and the intent was to accomplish it in language so plain as to leave no room for doubt on the question. That the end sought was accomplished, this court decided in *Koch v. Ashland, supra.*

But it is said there is a conflict in the two provisions, in that the first provides that the sixty-day period of neglect to act on a claim commences when the claim is presented to the common council for action, and the second that it commences when the claim is filed with the city clerk for such action; that the former relates to the class of claims to which the one in question belongs, and should prevail over the latter general provision, under a well-known rule of statutory construction. That rule does not apply where the later general statute or provision is so worded as to necessarily include the subject of the previous act or provision. It is a rule of construction adopted to the end that all provisions of an act may stand together, if such end can be attained without doing violence to the language used. The presumption is that when there is a particular clause of

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an act, or a special act, and a general clause or general act, in terms that may reasonably but not necessarily be construed to include the subject of the particular clause or act, the latter was intended as an exception. There is no room for the application of the rule where the language of the latter clause or act is so worded as to leave no reasonable ground for inference that it was intended otherwise than to cover and govern the particular subject, and all others as well, to which the language clearly relates. Such is the situation in this case. Sec. 13, subch. VIII, is so plainly worded that rules for judicial construction cannot be resorted to to determine the legislative intent, so far as relates to the subject covered by it. The legal presumption of the rule mentioned is rebutted by unmistakable language even if we agree that there is a conflict.

But it is considered that there is no conflict between the two sections. In judicial construction, one of the most familiar rules is that conflicts by implication or otherwise between different provisions of a statute, or between two statutes, are not favored and will not be held to exist if they may be otherwise reasonably construed. *Attorney General ex rel. Taylor v. Brown*, 1 Wis. 513; *Attorney General v. Railroad Cos.* 35 Wis. 425. Such rule has often been stated by this court to the effect that when two acts or provisions are susceptible of a construction which will give operation to both and all of the words in each, without doing violence to either, it is incumbent on the court to search for some reasonable ground for such construction, and not reach the conclusion that a fatal conflict exists, unless the meaning of the words and the manner of their use be such as to render it impossible to reconcile them on any reasonable theory, whereby all may be given force and effect.

Applying the foregoing to this case, the conclusion is easily reached that the words, "presented to the common

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council for allowance," and "filed with the city clerk for the action of the common council," are identical in meaning. The only orderly way by which a claim can be presented to a common council for its action is by filing the same with its clerk. When so filed it is, in legal effect, presented to the common council. The only effect of sec. 13, subch. VIII, is to broaden out the provision of sec. 4, subch. VII, so as to apply to all claims against the city of whatever character, whether arising on contract or otherwise.

The fact that the charter requires the comptroller to examine and report on all claims before action by the common council, does not warrant the conclusion that the legislative intent was that the council should have sixty days within which to act, after the report by the comptroller. The wording of the section in regard to the duties of the comptroller indicates that the legislative idea was that a claim would be, to all intents and purposes, before the council for action when filed with the clerk. It does not provide that a claim shall not be presented to the council for action till passed upon by the comptroller, but that it shall not be acted upon by them till first examined and reported on by him. He is required to examine and report on all claims presented,— report, obviously, to the council,— and that suggests, naturally, that the claim goes to his hands, in legal effect, from the council through its clerk. The word "presented," thus used, has the same significance as in the term, "presented to the common council," found in sec. 4, subch. VII. The requirement plainly is that the comptroller shall examine and report on all claims presented to the common council for their action, or filed with the city clerk for such action, and that the council shall not allow a claim till so examined and reported on.

The foregoing appears to be not only a reasonable construction, but very plainly in accord with what was intended by the lawmakers. It also accords with the decision of the

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trial court, and necessarily leads to an affirmance of the order appealed from. The right of appeal was perfect at the expiration of sixty days from the time of the presentation of the claim to the common council for allowance, by filing the same with its clerk for action thereon. Such right being perfect, the appellant was obliged to exercise it within the twenty days allowed by statute, or be forever barred from thereafter prosecuting his claim in any court. *Fleming v. Appleton*, 55 Wis. 90; *Koch v. Ashland*, 83 Wis. 361.

By the Court.— The order of the circuit court is affirmed.

BANK OF LODI, Respondent, vs. WASHBURN ELECTRIC LIGHT & POWER COMPANY, Appellant.

February 10 — March 1, 1898.

Election of remedies: Promissory notes.

A note given to a bank for its accommodation was transferred for value, before due, to one who did not know that it was accommodation paper, and was indorsed by the bank and its president. Prior to its maturity the indorsee sent the note to the bank for collection, but received no returns. Afterwards, acting upon the belief, induced in part by the conduct of the maker, that the note had been paid, he brought an action against the bank and its president for money had and received, and obtained a verdict. Before the entry of judgment he learned that the note had not been paid, but the judgment was nevertheless entered and execution issued and levied, partially satisfying the judgment. *Held*, that there had been no election of a remedy which would preclude an action by the indorsee against the maker on the note.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The Bank of Washburn, holding an accommodation note of $1,500, executed by defendant, transferred the same to

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plaintiff, for value, before due, the latter having no knowledge that it was accommodation paper. The note was indorsed by the Bank of Washburn and A. C. Probert, its president. At maturity the note was renewed, the latter note bearing date August 12, 1895, and due in sixty days. Prior to its maturity it was sent to the Bank of Washburn for collection. Not getting any returns from it, plaintiff's cashier, Hutson, went to Washburn and interviewed Mr. Probert, by whom he was informed that he supposed the whole matter had been settled. Hutson demanded the money or a return of the note, but got no satisfactory answer. Hutson then sought out Mr. Meehan, defendant's secretary, and informed him of the situation, and was then told that he knew nothing about the note or whether it was paid or not. Supposing it had been paid, Hutson then instituted an action against the Bank of Washburn and A. C. Probert for money had and received, and swore out an attachment. The action was brought to trial on June 23, 1896, the attachment was sustained, and verdict was rendered for the plaintiff for the amount of the note and interest. Prior to the entry of judgment, Hutson learned for the first time that the note had never been paid, and that Probert had returned the same to defendant about the time it became due, without payment. Judgment was afterwards entered, execution issued, and the attached property sold for $175 more than the expenses of the sale. The sheriff made return upon the execution that no other property of defendants could be found. This action was then commenced, in which the defendant set up the proceedings in the former case as a defense. After a full hearing, the court directed a verdict for plaintiff, and from the judgment entered thereon this appeal has been taken.

For the appellant there was a brief by *A. W. McLeod*, and oral argument *Mr. McLeod* and *Mr. W. M. Tomkins*. They contended, *inter alia*, that if respondent did not have knowledge of all the facts at the time of the commencement

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of its action against the Bank of Washburn and Probert, and subsequently upon the trial learned them and desired to pursue its remedy against appellant, it should have taken a nonsuit, or should not have entered the judgment rendered in its favor. Any decisive action of a party after knowledge of the facts determines his election in the case of conflicting and inconsistent remedies. *Sanger v. Wood*, 3 Johns. Ch. 417; *Terry v. Munger*, 121 N. Y. 161; *White v. White*, 68 Vt. 161; *Lee v. Corn*, 21 N. Y. Supp. 1073; *Clements v. Smith's Adm'rs*, 9 Gill (Md.), 160; *Howard v. Carpenter*, 11 Md. 259; *Parmlee v. Adolph*, 28 Ohio St. 10; *Thomas v. Joslin*, 36 Minn. 1; *Williams v. Ketchum*, 21 Wis. 438; *Bowker Fertilizer Co. v. Cox*, 106 N. Y. 555; *Kennedy v. Thorp*, 51 id. 174; *Strong v. Strong*, 102 id. 69; *Second Nat. Bank v. Burt*, 93 id. 233; *McLean v. Ficke*, 94 Iowa, 283; *Lloyd v. Brewster*, 4 Paige, 537; *Farwell v. Myers*, 59 Mich. 179; *Schiffer v. Dietz*, 83 N. Y. 300; *Bowen v. Mandeville*, 95 id. 237; *Acer v. Hotchkiss*, 97 id. 395.

For the respondent there was a brief by *Cate, Sanborn, Lamoreux & Park*, attorneys, and *D. F. O'Keefe*, of counsel, and oral argument by *B. B. Park*.

BARDEEN, J. The principal question on this appeal is whether respondent is bound by its election in suing the Bank of Washburn and A. C. Probert for money had and received for its use, upon the cause of action that it now sues appellant. It is a rule quite universal that where a party has a choice between two inconsistent rights or remedies, and deliberately and with full knowledge makes his choice, such election becomes conclusive upon him and precludes him from subsequently pursuing the other. *Mariner v. M. & St. P. R. Co.* 26 Wis. 84; *Warren v. Landry*, 74 Wis. 144; *Crook v. First Nat. Bank*, 83 Wis. 31. The attempt to apply this rule to the present case leads to the disclosure of the following facts: The Bank of Washburn and Probert,

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defendants in the former case, were indorsers on the note involved in this suit, and as such were liable to respondent either jointly or severally with appellant. Before it became due, it was sent to the Bank of Washburn for collection, and was taken by Probert, and returned to appellant without payment. The conduct of appellant's secretary, when visited by respondent's agent, was such as to lead the latter to believe the note had been paid. The former suit was instituted on the mistaken assumption that the note had been paid, and without knowledge of the true situation. The appellant is certainly somewhat to blame for this deception. A party is never bound by the election of a remedy, made in ignorance of substantial facts, which, if known, might proffer an alternative suit. 7 Ency. of Pl. & Pr. 366. And especially is this true when he is deceived or misled by the conduct of the party seeking to take advantage of the election.

It is not perceived how the rights of the appellant were in any way affected by the institution of the suit against the Bank of Washburn and Probert. All of the parties were under legal obligation to pay the amount of this note to respondent at the time of the institution of the first suit. A judgment against one would have been no bar to a judgment against the other. The mere fact that execution was issued and the attached property sold, after respondent became informed of the true situation, under the circumstances of this case, cannot be held to operate as an election to appellant's prejudice. Whatever was realized upon that judgment was really to its benefit. So long as the right existed for respondent to maintain an action against the Bank of Washburn and Probert, indorsers, and against appellant as maker of the note, it is difficult to see how the doctrine of election of remedies can be invoked in this case. There was nothing in the situation to lead respondent to believe that the relation of appellant to the Bank of Washburn was that

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of accommodation maker of the note. Indeed, every reasonable intendment from the situation would seem to lead to the contrary. The form of the note and its renewal would naturally suggest that it was one made in the regular course of business. The conduct of appellant's secretary, after being informed of all the facts, was sufficient to induce the belief that the note had been paid, and it ought not now to be permitted to take advantage of its own wrong.

For these reasons the judgment of the trial court was right.

By the Court.— The judgment of the circuit court is affirmed.

CASS and others, Respondents, vs. SUTHERLAND and others, Appellants.

February 11— March 1, 1898.

(1) *Appeal: Findings: Fraud.* (2) *Practice: Sale by sheriff of land in hands of receiver: Enforcement of lien: Judgment.*

1. Findings of the trial court that, pending plaintiffs' actions against an insolvent debtor, the latter had conveyed lands to a corporation formed by him, with intent to hinder, delay, and defraud them in the collection of their demands, are *held* to have been based upon sufficient evidence and will not, therefore, be disturbed on appeal.
2. The court which had appointed a receiver for a corporation rendered judgment for the plaintiffs in an action to subject lands in the hands of the receiver to the lien of plaintiffs' executions against the grantor of the corporation. The judgment directed that the sheriff proceed upon said executions to sell the lands. *Held*, that this direction was within the power of the court and will not be disturbed in the absence of anything to show that such method of enforcing the lien was prejudicial.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

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For the appellants there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins*.

For the respondents there was a brief by *Cate, Sanborn, Lamoreux & Park*, attorneys, and *Geo. P. Rossman*, of counsel, and oral argument by *A. W. Sanborn*.

WINSLOW, J. The plaintiffs were judgment creditors of the defendant *W. R. Sutherland*, and brought this action in equity to subject certain lands to the lien of executions theretofore issued upon their said judgments which had been levied upon said lands. It was alleged in the complaint and found by the court that pending the plaintiffs' actions the defendant *Sutherland*, being insolvent, had conveyed said lands to a corporation formed by him, called the *Sutherland Lumber Company*, with intent thereby to hinder, delay, and defraud the plaintiffs in the collection of their demands, and judgment was rendered setting aside said conveyance, and declaring said executions valid liens upon the land, and directing the sheriff to sell the same to satisfy the plaintiffs' judgments. These findings of fact were based upon sufficient evidence, and under familiar rules will not be disturbed by this court. They entirely justify the judgment which was rendered.

Another point, however, raised by the appellants, requires attention. It appears that after the plaintiffs' executions were levied the *Sutherland Lumber Company* became insolvent, and that the circuit court for Ashland county appointed a receiver of its property, who qualified and took possession thereof, including the real estate in question. The receiver is a party to this action. It is now objected that the court erred in directing the sheriff to sell the property, but should, after adjudging the lien, have left the property in the hands of the receiver, and directed him to sell the same in the receivership action. Courts will not ordinarily permit property in the hands of a receiver to be sold on execution, the reason being that by such means the prop-

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erty in the possession of the court will be dissipated and the court will be deprived of jurisdiction to administer it. And this doctrine has been applied to cases where there is a valid levy prior to the appointment of the receiver. High, Receivers (3d ed.), § 141; *Walling v. Miller*, 108 N. Y. 173; *Ballin v. Loeb*, 78 Wis. 404; *Ballin v. Merchants' Exch. Bank*, 89 Wis. 278. It is, however, a question of administration of assets. The court appointing a receiver may grant leave to the creditor to proceed and sell upon execution. *Walling v. Miller, supra; Wiswall v. Sampson*, 14 How. 52. In the present case both actions were in the same court, and the receiver was a party to the action brought to subject the lands to the lien of the execution levies. Under these circumstances the judgment authorizing and directing the sale of the lands upon the plaintiffs' executions can be regarded as nothing less than a formal direction by the court which appointed the receiver that the land be sold by the sheriff under the execution, instead of by the receiver. The court having power to so direct, and nothing appearing to show that such method of enforcing the lien is prejudicial, there is no ground for interference by this court.

By the Court.— Judgment affirmed.

BIGELOW and others, Appellants, vs. TOWN OF WASHBURN and another, Respondents.
SAME, Respondents, vs. SAME, Appellants.

February 11 — March 1, 1898.

Appeal: Sufficiency of pleading: Remedy at law: Demurrer ore tenus: *Equity: Taxation: Interest: Town orders: Presumption as to validity: Highway taxes: Basis of computation.*

1. The objection that the complaint fails to state a cause of action cannot be raised for the first time on appeal.
2. The objection that the plaintiff has an adequate remedy at law cannot be raised by a demurrer *ore tenus* to the complaint.

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3. Where, pending an action in equity to set aside alleged illegal taxes and restrain a levy upon personal property to collect the same, the defendant town made such levy and the plaintiff was obliged to pay the entire amount of the tax to prevent a sale, *it would seem* that the action should not be dismissed on the ground that the plaintiff has an adequate remedy at law, but the court should retain jurisdiction and grant such relief as the changed conditions demand.
4. The levy by a town board of a tax to pay interest on outstanding orders is *held* to have been without authority, in the absence of anything to show that they had ever been presented, or that the holders were threatening suit thereon.
5. In the absence of evidence to the contrary it will be presumed that outstanding orders and bills allowed by a town board of supervisors were for legal obligations, and that it would not be inequitable for the town to pay them.
6. At a special town meeting held July 17 it was voted to levy a tax for highway purposes for that year. The town had theretofore voted to collect the highway taxes in money. *Held*, that such tax was properly computed on the basis of the valuation of the preceding year.

APPEALS from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The plaintiffs brought this action in the circuit court for Bayfield county to set aside the taxes levied on their real and personal property for the year 1895, and to restrain defendant's treasurer from levying upon their personal property to collect the same. A temporary restraining order was issued by the court, which was afterwards set aside upon defendant's application. Pending the suit, defendant's treasurer levied upon plaintiffs' personal property for the taxes upon their real and personal property, and, in order to prevent a sale, plaintiffs were obliged to pay the full amount of the tax involved in this suit. Thereupon, and by leave of court, plaintiffs made and filed a supplemental complaint, which contained the allegations of the original complaint, with a statement that their property had been levied upon and the tax paid, and a demand for judgment that

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they be reimbursed for that portion of the tax so paid found to be illegal.

An answer was duly served, and the case referred to a referee to report the testimony. Upon the coming in of the referee's report and the opening of the trial, "the defendants objected to the introduction of any evidence under the complaint, for the reason that the plaintiffs have an adequate remedy at law," which was overruled. At the trial it was stipulated that the sum of $7,985.31, levied for railroad fund, was void for the reason that it was levied for railroad aid bonds not earned. The complaint attacked the following levies made by the town, on the ground that they were illegal:

"Outstanding orders, general fund	$5,749 15
Bills allowed, no orders drawn	4,344 41
Outstanding orders, highway funds	6,396 57
Bills allowed, no orders drawn	218 19
Outstanding orders, school fund	4,400 00
Railroad tax	7,985 31
For interest on orders	1,500 00
Excess on highway mill tax	1,980 48
	$32,574 11"

The court found substantially that the levies for railroad purposes and for interest on outstanding orders were void, and that the other levies were valid, and gave judgment for plaintiffs for $2,136 and costs. This sum, as near as we can ascertain from the defective condition of the record, is that portion of the railroad tax and interest on outstanding orders charged against plaintiffs' property.

Both parties excepted to the findings and have appealed from the judgment.

For the plaintiffs there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins*.

For the defendants there was a brief by *A. W. McLeod* and *A. M. Warden*, and oral argument by *Mr. McLeod*. To the point that the objection that the complaint does not

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state a cause of action is available at any stage of the proceeding, they cited 6 Am. & Eng. Ency. of Law, 373, 380; *Harris v. Harris*, 10 Wis. 467.

BARDEEN, J. The point is made that the amended complaint does not state facts sufficient to constitute a cause of action, in that it fails to allege the filing of a claim with the town clerk to be laid before the town board of audit, as required by sec. 824, R. S. 1878. The objection is first raised in this court. No demurrer was filed to the complaint; no objection that was available to defendant was taken at the trial; and no plea in abatement was interposed. Under repeated decisions of this court, the failure to make timely objections in the manner indicated is an effectual waiver of the right to insist upon this objection. *Jaquish v. Ithaca*, 36 Wis. 108; *Sheel v. Appleton*, 49 Wis. 125; *Collette v. Weed*, 68 Wis. 428; *Lombard v. McMillan*, 95 Wis. 627.

The objection made at the trial that the plaintiffs had an adequate remedy at law is equally unavailable. Such an objection must be taken by demurrer or answer on that ground, or it is waived. A demurrer *ore tenus* is not available. *Meyer v. Garthwaite*, 92 Wis. 571; *Sweetser v. Silber*, 87 Wis. 102. Even if this were not so, this would seem to be a proper case to invoke the rule that when a defendant in a bill in equity disenables himself, pending the suit, to comply with an order for the specific relief sought, the court will retain jurisdiction, and grant such relief as the changed conditions seem to demand. See *Leonard v. Rogan*, 20 Wis. 540; *Hopkins v. Gilman*, 22 Wis. 476; *Combs v. Scott*, 76 Wis. 662; *Cole v. Getzinger*, 96 Wis. 559; *Milkman v. Ordway*, 106 Mass. 232.

The court found that the items in the levy for "railroad tax" and "interest on outstanding orders and bills" were illegal and void. The first item was admittedly bad, under the ruling of this court in *Keystone Lumber Co. v. Bayfield*, 94 Wis. 491, as being a levy to pay bonds not yet issued.

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The second item was included in the levy pursuant to a resolution of the town board to pay interest on all town orders issued prior to December 15, 1893, at six per cent., upon condition that the holders of the same would file with the clerk a written guaranty that they would not put the orders into judgment. Town orders are not negotiable instruments. R. S. 1878, sec. 1675. A town is not liable for an order drawn on its treasurer until after demand and refusal of payment. *Packard v. Bovina*, 24 Wis. 382. Such orders do not bear interest in the absence of statute. 2 Beach, Pub. Corp. § 880; *Snyder v. Bovaird*, 122 Pa. St. 442. The proceeding adopted by the town board was in no sense an attempt to compromise town indebtedness. So far as the evidence in this case shows, we are left in the dark as to whether the orders upon which interest was to be paid had ever been presented for payment, or whether the holders were threatening suit or not. Such being the state of the record, we hold that there was absolutely no authority on the part of the town board to make the levy in question, and the finding of the trial judge was correct.

Complaint is made that the levies for outstanding orders and bills allowed were illegal. The poverty of the evidence with reference to these items is significant. So little, in fact, appears with reference to these claims, that counsel are driven to say that, as to outstanding orders, they were either covered by the levy for the preceding year or were issued in excess of the levy. There is the same dearth of evidence relating to the levy for bills allowed. We are left to infer that these levies are void, because they happen to be unfortunately christened. Equity will not grant relief upon any such doubtful or uncertain basis. In absence of evidence to the contrary, the court is bound to presume that the orders and bills mentioned were legal obligations, and that it would not be inequitable for the town to pay them. The decision of this court in *Hixon v. Oneida Co.* 82 Wis. 515, and other

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cases, substantially establish this doctrine, and there is absolutely no reason shown in this case why the plaintiff should not be bound by it. The same is true as to the levy for outstanding school orders and highway orders. So far as we are advised by the evidence, all of these orders were valid, subsisting obligations of the town. We are bound to presume that they were issued by legal authority and upon a sufficient consideration, in absence of proof to the contrary. It follows, therefore, that the plaintiffs suffer no hardship in being compelled to bear their share of the burden thus imposed.

Another ground of complaint arises from the manner in which the highway taxes were carried out on the roll by the clerk. At a special town meeting held July 17, 1895, it was voted to raise a five-mill tax for highway purposes for that year. The clerk computed the amount of such tax upon the assessed valuation of the property of the town for the year 1894, which was $1,827,334, and carried it into the roll of 1895. The assessed valuation of the town for 1895 was $1,479,734; so that, upon the plan adopted by the clerk, upon the latter valuation the tax amounted to six and one-third mills. The town had theretofore voted to collect the highway taxes in money. The plan adopted by the clerk seems to have been in accord with the decision of this court in *Hebard v. Ashland Co.* 55 Wis. 145, where it was said: "The statute evidently contemplates that such tax should be computed upon the basis of the valuation of the previous year. This kind of tax is required to be levied on or before the second Monday of May in each year, and the tax roll of that year has not yet been made, and the assessment has not yet been corrected and perfected by the board of review, which sits on the last Monday of June." It is a fact quite notorious, and made manifest from the testimony herein, that town assessments vary largely from year to year (in this case nearly $400,000); and it seems very proper

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to adopt a construction that will enable both the electors and the town board to know positively whether the amount voted for highway purposes is likely to exceed the limit fixed by R. S. 1878, sec. 1240.

This disposes of the objections raised by both parties, and it follows therefrom that the decision of the trial judge was correct.

By the Court.— The judgment of the circuit court is affirmed on both appeals.

FLAHERTY, Respondent, vs. HARRISON, Receiver, Appellant.

February 11— March 1, 1898.

Electric street railways: Collision with wagon at crossing: Excessive speed: Negligence of motorman: Evidence: Court and jury.

1. Where all reasonable probabilities from facts unquestionably established by the evidence are on one side of a controversy, the testimony of an interested party to the contrary does not create a conflict of evidence requiring such controversy to be submitted to and determined by a jury or, if submitted, support their determination, if contrary to all such reasonable probabilities.
2. Thus, in an action for personal injuries received in a collision between an electric street car and the wagon in which plaintiff was driving, where the undisputed evidence showed that neither the car nor the wagon was injured or showed any evidence of the collision, and that after the collision the car was stopped as soon as would have been practicable had it been going at an ordinary rate of speed, plaintiff's testimony that the car was going at a speed of twenty miles per hour is *held* to be incredible and insufficient, of itself, to warrant a jury in finding that the car was going at a negligent rate of speed.
3. The complaint in such case alleged that the motorman was negligent in that he ran into the wagon without giving any signal of the approach of the car by sounding the bell. The evidence showed that he sounded the bell constantly while passing over a distance of about 100 feet in approaching the crossing at which the collision

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occurred; that plaintiff saw the car approaching when his horses' heads were just over the track, and immediately backed them clear of the track and stopped, with them completely under control; that when the car was close at hand the horses became frightened by the bell and the noise and appearance of the car, and jumped forward bringing the wagon in front of the car. There was no evidence that the horses showed symptoms of fright till the instant they jumped in front of the car. *Held*, that there was no warrant for submitting the case to the jury on the claim that there was a negligent ringing of the car bell which caused the horses to become frightened and unmanageable.

4. Actionable negligence on the part of the motorman in such a case is not shown unless it is a reasonable inference from the evidence and circumstances established thereby that the jumping forward of the horses was a natural and probable result of his conduct, and that, as a person of ordinary intelligence and prudence, in the light of attending circumstances, he ought reasonably to have anticipated such result, or some injury to plaintiff, by reason of such conduct.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action to recover damages for personal injuries. The complaint is to the effect that plaintiff approached defendant's street-car track, located on Second street, in the city of Ashland, Wisconsin, from the south, traveling on a cross street known as "Ninth Avenue West;" that he was riding in a wagon, driving a team hitched thereto; that at the intersection of the streets there was a building on one side and a high bill board on the other, which so obstructed his view that he could not see an approaching car till he was near the track; that the track was about twenty-six feet from the street line; that as he was passing over the track, his horses walking at a rapid rate of speed, a car coming from the west at a great rate of speed, without the motorman giving any signal of its approach by sounding the car bell, struck the wagon and turned it over, throwing the plaintiff out against a curbstone and telephone pole, causing the injuries for which the damages are claimed.

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Looking at the evidence in the most favorable light for plaintiff, it is to the following effect: Plaintiff approached the track as alleged. The obstructions to his view existed as claimed. Plaintiff was standing up in his wagon. When the horses' heads were just over the track, plaintiff saw a car approaching from the west. The motorman, at that instant, immediately signaled for a clear track by vigorously sounding his bell. Plaintiff immediately backed his team clear of the track, and then stopped with the horses under complete control. In backing, the team swung a little to the right so as to stand somewhat diagonally to the track. As the car reached a point nearly opposite where the horses stood, they became frightened by the sound of the bell and the noise and appearance of the car, causing plaintiff to lose control of them, whereupon they jumped forward, onto and partially across the track, so as to place the wagon in the pathway of the car. The car instantly struck the wagon near the front end, at which instant plaintiff fell over the side of the wagon box towards the car and let go the lines. Instead of falling to the ground, he caught hold of the wagon box and hung onto it, with his body outside. The horses ran away diagonally across the track and down the street, with plaintiff hanging to the box, and as the hind part of the wagon crossed the track the car collided with it at a point about thirty or forty feet from the first collision. After the horses ran about one hundred feet they passed near a telephone pole on the left hand side of the street so that plaintiff's body collided with the pole, forcing him to lose his hold on the box and fall to the ground. The evidence is undisputed that plaintiff sustained some injuries, and that neither the wagon nor the car was injured or showed any evidence of the collision. There is some conflict in the evidence as to the speed of the car, but looking at that in the most favorable light for plaintiff, it is to the effect that if the car was going at the rate of about eight

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miles an hour, it would not have been practicable to have stopped it inside of about fifty feet, and that it actually did stop in going from thirty to forty feet after the car first struck the wagon.

At the close of the evidence there was a motion on the part of the defendant for the direction of a verdict, which was denied, and the ruling duly excepted to. A verdict on the evidence was rendered in plaintiff's favor. There was a motion to set the verdict aside as contrary to the evidence, and for a new trial, which was denied. Judgment was rendered in plaintiff's favor on the verdict, from which this appeal was taken.

For the appellant there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins*.

For the respondent there was a brief by *Cate, Sanborn, Lamoreux & Park*, attorneys, and *D. F. O'Keefe*, of counsel, and oral argument by *B. B. Park*.

MARSHALL, J. The question for decision on this appeal is, Does the evidence warrant the verdict and the judgment, under the rule that, if there is any credible evidence in that regard, which, if believed, is sufficient therefor, the ruling of the trial court, refusing to grant a new trial for insufficiency of evidence, will not be disturbed on appeal?

It is apparent at the outset that there was an entire failure to establish the facts pleaded to show actionable negligence. While it is alleged that plaintiff was driving his team across the street railway track at the time of the injury, the evidence shows that the team became unmanageable while standing in a safe position, and jumped forward across the track immediately ahead of the car, so that it was impracticable to stop the car after the team started. The complaint states that the plaintiff proceeded onto the track without observing the coming car, because the motorman failed to signal the approach by sounding his car bell.

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The evidence shows that the motorman sounded the car bell constantly while passing over a distance of about 100 feet in approaching the crossing, and the negligence relied on to support the verdict is not failure to sound the bell, but sounding it too much, as the car approached the crossing, so that the noise of the bell, concurring with the noise and appearance of the rapidly approaching car, frightened the team and caused them to become unmanageable and jump onto the track. There is not a scintilla of evidence that the horses, by their appearance, indicated danger of their running away or becoming unmanageable on account of the approach of the car and the noises incident thereto, up to the very time they became unmanageable and jumped forward.

Aside from the evidence of plaintiff that the car was going at a speed of twenty miles an hour, there is no fact alleged in the complaint showing negligence that is supported by evidence, and it cannot be said that plaintiff's testimony as to the speed of the car was credible in the face of the undisputed evidence that neither the car nor the wagon was injured or showed any evidence of the collision, and that the car was stopped as soon as practicable after the collision if it was going at an ordinary rate of speed. Where all reasonable probabilities from facts unquestionably established by the evidence are on one side of a controversy, the testimony of an interested party to the contrary does not create a conflict of evidence requiring such controversy to be submitted to and determined by a jury, or, if submitted, support their determination, if contrary to all such reasonable probabilities. *Badger v. Janesville Cotton Mills*, 95 Wis. 599. It follows that there was no evidence to warrant a jury in finding that the car was going at a negligent rate of speed as it approached the crossing, or for submitting that question to a jury.

Further, in face of the claim of negligence in the com-

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plaint that the motorman ran the car into plaintiff's wagon and overturned it, without giving any signal of the approach of the car, there was no warrant for submitting the case to the jury on the claim that there was a negligent ringing of the car bell which caused the horses to become frightened and unmanageable, especially when there was no evidence that the horses showed symptoms of fright till the instant they jumped ahead of the car.

Looking at the case in the light of the pleadings and the evidence, it is considered that there was no evidence that the motorman was negligent, and certainly no evidence of actionable negligence, in that there was no room for a reasonable inference from the evidence and circumstances established thereby that the jumping forward of the team was a natural and probable result of the conduct of the motorman, and that, as a person of ordinary intelligence and prudence, in the light of attending circumstances, he ought reasonably to have anticipated such result, or some injury to plaintiff, by reason of such conduct. *Deisenrieter v. Kraus-Merkel Malting Co.* 97 Wis. 279. Before that essential test of actionable negligence the plaintiff's case seems to fail so completely as to lead to the conclusion that it was entirely overlooked by the trial court.

The case of *Eastwood v. La Crosse City R. Co.* 94 Wis. 163, is a far stronger case to sustain a claim of actionable negligence than the one before us, and this court there decided that no such negligence was disclosed by the evidence. The circumstances were that the horses and conveyance were in a place of safety as the car approached; that though exhibiting some evidence of uneasiness, they were under the control of the driver till just as the car was passing them. They then suddenly jumped around and backed the sleigh onto the track, causing the injury complained of. There was no interval between the instant of the backing of the horses and the collision, sufficient to stop the car. The

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claim was made that the motorman should have observed the uneasiness of the horses and applied the brake to the car so as to control its motion with reference to any danger that existed of the horses' placing themselves or the sleigh in its path. In deciding the case the court, by Mr. Justice WINSLOW, said, in substance, that a motorman is not required to apply the brakes whenever he sees a horse in the street, along the track, showing some symptoms of apprehension; to demand that a street car must be slowed up or stopped every time a horse or a team displays signs of uneasiness, would render it impossible for street-car companies to perform their duty to the public by furnishing speedy transportation of passengers. All that was said in the opinion on the line indicated applies most strongly to the facts of this case, because there is no evidence here of the fright of the team till the instant they jumped onto the track, and the plaintiff testified that they were under his control till that instant. The ruling in *Bishop v. Belle City St. R. Co.* 92 Wis. 139, is also decisive of this case, though the facts there do not make its application quite as well defined as that of *Eastwood v. La Crosse City R. Co., supra.*

It follows from the foregoing that the defendant's motion, made at the close of the evidence, for the direction of a verdict should have been granted, and that the motion to set aside the verdict as contrary to the evidence should have been granted.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

Authorities as to the frightening of a horse by a street car are collected in a note to *Doster v. Charlotte St. R. Co.* (117 N. C. 651), in 34 L. R. A. 481.— REP.

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CROWLEY, Appellant, vs. HICKS and others, Respondents.

February 11 — March 1, 1898.

Pleading: Making definite and certain: Appeal: Fraud: Auction sales of land: Statute of frauds: Joinder of causes of action: Executors: Limitations.

1. An appeal from an order directing a complaint to be made more definite and certain will be dismissed unless there was an abuse of discretion.
2. In pleading fraud it is not sufficient to allege the mere conclusion that the party acted fraudulently, but the facts from which such conclusion is drawn must be stated.
3. In an action to compel a conveyance of land which plaintiff claimed to have bought at auction sales, an allegation in the complaint that when the land was first put up at auction by defendants the plaintiff was the highest and best bidder, and that "memoranda of the bids and sale were duly made and kept by the parties," is *held* insufficient to show a compliance with the statute of frauds (sec. 2304, R. S. 1878), where the complaint does not state that a sale was then in fact made, but alleges two subsequent auction sales of the same land by the defendants, at each of which, also, the plaintiff was the highest and best bidder, and does not show upon which sale he relies.
4. A cause of action against executors in their representative capacity cannot be joined with a cause of action against them as individuals.
5. A demurrer on the ground that the action was not commenced within the time limited by law will not be considered if it fails to refer to the statute relied on, as required by sec. 2651, R. S. 1878.

APPEALS from orders of the circuit court for Sawyer county: JOHN K. PARISH, Circuit Judge. *Affirmed as to one order; appeal dismissed as to the other.*

The defendants are proceeded against personally and as executors of the last will and testament of Hiram W. Webster, deceased. The substantial allegations of the complaint are as follows: (1) That Hiram W. Webster, in his lifetime, was the owner of certain lands, describing them. (2) That Webster died May 4, 1884, leaving a will, in which the defendants

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were named as executors; and that they accepted the trust. (3) That the executors named were empowered to sell said real estate. (4) That in October, 1884, the executors filed an inventory, in which the lands in question were valued at $10,000. (5) That in July, 1886, the executors offered said lands for sale for $26,500, and that, in case they were not sold during that month, they would be offered for sale at public auction, without reserve. (6) That on July 20, 1886, plaintiff promised to pay, and *Sargent* and *Webster* agreed to receive, $26,500 for said lands, but that this court decided that agreement void. (7) That thereafter defendants, as executors, offered said lands for sale at auction, that many bids were made, and that plaintiff's bid of $34,000 was the highest and best bid, and that he was prepared to pay the money and receive a deed, and demanded that said lands be conveyed to him, "at which auction sale, memoranda of the bids and sale were duly made and kept by the parties aforesaid." (8) That thereafter defendants notified plaintiff at two different times that said lands would be sold at auction, and at each of said sales plaintiff attended, numerous bids were made, and he was the highest and best bidder for the same. (9) That plaintiff has been ever ready and willing to pay the amount of his said bid, and to carry out any one of his said bids; that he has "expended large sums of money and valuable time in his effort and endeavor to purchase" said lands, but defendants refuse to convey the same to him. (10) "That the defendant *Hicks* heretofore, to wit, at the time of said auction sales, conspired and connived, with the knowledge of the other defendants, to cheat and defraud this plaintiff out of the said lands, and of the purchase thereof, and which said other defendants then and there, by their course and conduct in the matter, permitted said defendant so to do, and thus became liable, together with the estate aforesaid, to this plaintiff in the premises." (11) That said *Hicks* declared to the other defendants that plaintiff should not have said lands, and the other defendants, by their acts,

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consented thereto; "that the knowledge of said fraudulent acts and purposes of the said defendants was not obtained or received or known to this plaintiff until June, 1894;" that the purpose of *Hicks* to obtain plaintiff's bid and prevent his obtaining the lands, and the consent thereto by the other defendants, was made with intent to defraud and deceive the plaintiff. (12) That plaintiff has expended for his expenses for the purpose of purchasing said lands $3,500, and the value of said lands when purchased by plaintiff was $52,500.

The demand for relief is that defendants be required to convey said lands to the plaintiff, and pay such damages as he has suffered; and, if defendants have conveyed said lands, then that plaintiff have judgment for the value thereof, less the amount of his bid.

Defendants *Sargent* and *Webster* filed separate demurrers as individuals and as executors: (1) "That several causes of action have been improperly *found*" [the word "found" was evidently intended for the word "united," as found in the statute]: (a) "One cause of action for specific performance, another in tort." (b) A cause of action against the defendants personally with an action against them as executors. (2) That the complaint does not state facts sufficient to constitute a cause of action. And (3) that the action was not commenced within the time limited by law. The defendant *Hicks*, personally and as executor, entered a motion to make the complaint more definite and certain.

The demurrers were sustained, and the motion to make more definite and certain granted. Plaintiff appealed from both orders.

For the appellant the cause was submitted on the brief of *J. F. Ellis.*

For the respondent *Hicks* there was a brief by *Hooper & Hooper*, and oral argument by *Moses Hooper.*

For the other respondents there was a brief by *Bouck & Hilton*, and oral argument by *Gabe Bouck.*

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BARDEEN, J. The appeal from the order directing plaintiff to make his complaint more definite and certain should be dismissed. The application in this respect was addressed to the discretionary power of the court, and cannot be reviewed except for abuse. There were ample grounds for the order made in this case. *McCarville v. Boyle*, 89 Wis. 651; *Adamson v. Raymer*, 94 Wis. 243.

The complaint, as challenged by the demurrer, raises two questions: (1) Does the complaint state facts sufficient to constitute a cause of action? (2) Is there a misjoinder of causes of action?

There were two demurrers, one interposed by defendants *Sargent* and *Webster* as individuals, and the other in their capacity as executors. A mere inspection of the complaint leads at once to the conclusion that it is barren of allegation of any fact to support a suit against *Sargent* and *Webster* as individuals. If they are chargeable at all as individuals, it arises from the allegations of fraud contained in the tenth and eleventh paragraphs of the complaint, which are substantially set forth in the statement of facts. In the tenth paragraph it is said that the defendant *Hicks*, at the time of said auction sales, conspired and connived, with the knowledge of the other defendants, to cheat and defraud the plaintiff out of said lands, and that the other defendants, by their course and conduct in the matter, permitted *Hicks* so to do, and thus became liable with the estate by virtue of the fraud aforesaid. In the following paragraph the pleader states substantially that *Hicks* determined and declared to the other defendants that plaintiff should not be permitted to purchase said lands, and that the other defendants, by their acts in the premises, consented thereto; and that the acts of *Hicks*, and the consent thereto by the other defendants, were made with intent to defraud and to deceive the plaintiff. The other allegations of the complaint indicate that, in so far as these defendants were dealing with the land, they

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acted in the capacity of executors; and if, as plaintiff claims, a contract was made which he is entitled to have enforced, the attempt to charge fraud upon the defendants personally avails him nothing. But, if this fact should be deemed material to the plaintiff's right of recovery, yet the pleader has violated every canon of correct pleading by omitting to state any fact from which the conclusion of fraud may be inferred. He contented himself with stating vague and unsatisfactory conclusions, leaving it in uncertainty as to what his real purpose was. "In alleging fraud it will not suffice to say that the party fraudulently procured, or fraudulently induced, or fraudulently did this or that, or that he committed or was guilty of fraud; the facts which constitute the fraud must be stated. Fraud is a conclusion of law. A statement that defendants in 'concert did, by connivance, conspiracy, and combination, beat and defraud the plaintiff out of,' etc., does not state the facts that constituted the cause of action. It does not appear what they did; the legal conclusion — an epithet only — is applied to their acts without knowing what they were." Bliss, Code Pl. § 211; *Cohn v. Goldman*, 76 N. Y. 284. Tested by this rule, the complaint falls far short of stating a cause of action against the defendants as individuals, even if it be conceded that they may be joined in this action.

As affecting the defendants in their official capacity as executors, the complaint states that in July, 1886, the plaintiff promised to pay the defendants the sum of $26,500 for this land, and the defendants *Sargent* and *Webster* promised to receive the same therefor, but that this court held such agreement void; that thereafter defendants notified plaintiff that said lands would be put up at auction and sold to the highest bidder; that thereafter said lands were put up at auction, defendant *Hicks* acting as auctioneer and bidding against the plaintiff; that many bids were made, and that plaintiff's bid of $34,000 was the highest and best bid; that

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at said sale "memoranda of the bids and sale were duly made and kept by the parties aforesaid." The pleader fails to state that any sale was in fact made; but, if he had stopped here, it is possible that we might have inferred, from the statement that "memoranda of the bids and sale were duly made and kept," that such memoranda, duly made, might have been a compliance with sec. 2304, R. S. 1878. *Gunderson v. Thomas*, 87 Wis. 406. This section provides that every contract for the sale of any lands shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the sale is made, or his lawfully authorized agent. This court has held that auction sales of real estate come within the statute, and that the memorandum, to make the sale valid, must be made by the auctioneer contemporaneously with the sale. *Bamber v. Savage*, 52 Wis. 110. But the pleader does not stop here. In the eighth and ninth paragraphs of the complaint he states that thereafter — that is, after the alleged sale before mentioned — the defendants at two different times notified him that said lands would be sold at auction to the highest bidder for cash, and that at each of said two sales the plaintiff attended and bid upon said lands, and at each he was the highest and best bidder therefor, and that he has been ready and willing to carry out any one of his said bids, and to purchase said lands, but the defendants have refused to convey the same. Whatever inference the court might have been at liberty to indulge in to support the alleged sale first mentioned is negatived by these averments as to subsequent sales. Construing the complaint together, it is entirely uncertain upon which sale the plaintiff relies, and we are not assisted in any way by reference to the prayer for relief.

But conceding that he relies upon the sale first mentioned, personally, I have grave doubts as to the sufficiency of the allegations of the complaint in reference thereto. The alle-

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gation that *Hicks* acted as auctioneer and executor and bid at the sale against the plaintiff would seem to indicate that the sale was not without reserve. All the authorities agree that, in order to complete a sale at auction, there must be a bidder capable of becoming a purchaser, and *an acceptance* thereof by the auctioneer, either by the knocking down of a hammer, or some other usual mode of declaring the sale complete. Bateman, Auctions (5th ed.), 164; Squibbs, Auctioneers, 43; 2 Livermore, Agency, 333. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. There is no showing that the alleged sale was ever assented to by these demurring defendants. This court has decided that all the executors must join in the execution of the power of sale under the will under which they act. It may be doubtful, also, whether the allegation in regard to the making and keeping of memoranda of bids and sale is sufficient, even under the most liberal construction of the pleading. Had there been a positive allegation of sale at auction, followed by another that "memoranda were duly made and kept," we might be compelled to hold it sufficient, under the former decisions of this court. It is, however, a loose and shiftless style of pleading, that ought not to receive encouragement.

This view of the pleading perhaps renders it unnecessary to decide the other grounds of demurrer. For the future guidance of parties interested, it may not be out of place to call attention to the rule regarding the joinder of causes of action in cases like this. The following quotation from Pomeroy's Code Remedies (§ 502) seems to state the rule with sufficient clearness to leave nothing else to be said: "Another particular rule, which is but an application of the same doctrine, requires that the several causes of action against or for a given person should all affect him in the same capacity. In other words, a demand for or against a party in his personal character cannot be united with an-

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other demand for or against him in a representative character as trustee, executor, administrator, receiver, and the like. The reason usually given for this rule when applied to defendants is that the judgment upon one cause of action would be against the defendant personally, to be made *de bonis propriis*, while the judgment upon the other cause of action would be against him in his representative or official capacity, and not to be made out of his own property; as, for example, it might be made *de bonis testatoris*." See *Hoffman v. Wheelock*, 62 Wis. 434.

The ground of demurrer assigned that the action was not commenced within the time limited by law will not be considered, because it fails to refer to the statute claimed to limit the right to sue. R. S. 1878, sec. 2651.

By the Court.— The appeal from the order to make the complaint more definite and certain is dismissed, and the order sustaining the demurrer is affirmed.

DARCEY, Respondent, vs. THE FARMERS' LUMBER COMPANY OF WISCONSIN, Appellant.

February 11— March 1, 1898.

Master and servant: Personal injuries: Res adjudicata: ***Assumption of risk: Special verdict: Inconsistency.***

1. The decision on former appeals in an action for personal injuries that the plaintiff did not, as a matter of law, assume the risk of the accident, and that the evidence was sufficient to support a finding of the jury that the keeping of the saw upon which plaintiff was injured in its exposed condition was negligence which was the proximate cause of the injury, renders those matters *res adjudicatæ* on appeal from the judgment rendered on a new trial on which the evidence was substantially the same as before.
2. A special verdict is *held* sufficient to cover the issue as to plaintiff's assumption of risk, although the question submitted on that point made what plaintiff, not what a man of ordinary prudence and intelligence, ought reasonably to have foreseen under all the cir-

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cumstances, the test as to assumption of risk, where, construed in the light of the charge of the court, the answer of the jury to such question was to the effect that the plaintiff, as a man of ordinary intelligence and prudence, in the exercise of ordinary care, ought not to have known, nor reasonably to have expected or foreseen, that he was liable to sustain such an injury while in the performance of his duties.

3. A finding in a special verdict that a person of ordinary prudence and intelligence, engaged in the operation and management of defendant's mill, ought reasonably to have foreseen that an injury would be likely to occur to a person employed as plaintiff was by coming in contact with the exposed saw in question, is *held* not to be inconsistent with a finding that the plaintiff, as a man of ordinary prudence and intelligence, ought not reasonably to have expected or foreseen that an injury would be liable to occur to him while performing his duties in the mill by coming in contact with the saw.

APPEAL from a judgment of the circuit court for Lincoln county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

The facts are stated in the opinion.

For the appellant there was a brief by *Stark & Hansen*, and oral argument by *Joshua Stark*. They contended, *inter alia*, that both the employer and employee stand upon the same footing of responsibility in respect to perils and dangers that are patent, open, and obvious,—dangers which may readily be known and comprehended by any person of ordinary prudence and intelligence, in the exercise of ordinary care. This is especially true where both have equal means of knowledge. *Goltz v. M., L. S. & W. R. Co.* 76 Wis. 136; *Ballou v. C. & N. W. R. Co.* 54 id. 257; *Behm v. Armour*, 58 id. 1; *Casey v. C., St. P., M. & O. R. Co.* 90 id. 113; *Gavigan v. L. S. & M. S. R. Co.* 67 N. W. Rep. 1097; *Klatt v. N. C. Foster L. Co.* 92 Wis. 622; *Holt v. C., M. & St. P. R. Co.* 94 id. 596; *Erdman v. Illinois Steel Co.* 95 id. 6; *Showalter v. Fairbanks, M. & Co.* 88 id. 381; *Luebke v. Berlin Machine Works*, id. 442.

For the respondent the cause was submitted on the brief of *Cate, Sanborn, Lamoreux & Park.*

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CASSODAY, C. J. This is an action to recover damages sustained by the plaintiff while in the employment of the defendant in its sawmill, by reason of the alleged negligence of the defendant in keeping a large rotary saw partially uncovered. Issue being joined and trial had, the jury, at the close thereof, returned a special verdict to the effect (1) that the location, situation, and surroundings of the saw by which the plaintiff was injured, and the extent to which it was uncovered and exposed, were known to the plaintiff prior to the time of his injury; (2) that the defendant did not exercise reasonable and ordinary care in keeping the saw upon which the plaintiff was injured in the position and condition in which it was at the time of his injury; (3) that a person of ordinary prudence and intelligence, engaged in the operation and management of the defendant's mill, ought to have reasonably expected or foreseen that an injury would be likely to occur to a person employed as the plaintiff was by coming in contact with the saw in question; (4) that the plaintiff did not know, nor ought he reasonably to have expected or foreseen, under all the circumstances, that an injury would be liable to occur to him while performing his duties in the mill by coming in contact with the saw; (5) that they assessed the plaintiff's damages at $2,500. From the judgment entered thereon the defendant appeals.

When this case was here upon a former appeal, we declined to hold as a matter of law that the plaintiff assumed the risk of the accident. 87 Wis. 245, 249; 91 Wis. 654. The danger was one not usually attendant upon the plaintiff's employment, and of which he had not been warned. So it was held upon such appeal that there was evidence sufficient to support the finding of the jury to the effect that the keeping of the saw in its exposed condition was negligence on the part of the defendant which was the proximate cause of the injury. *Id.* The evidence on this appeal is substantially the same as on the former appeals. The plaintiff was twenty-

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three years of age at the time of the injury. The decisions of this court on those appeals necessarily dispose of the exception to overruling the demurrer *ore tenus;* and also the exceptions to the second, third, and fourth findings of the jury, on the ground that they are not supported by the evidence. The first question submitted was, by consent of the parties, answered by the court. The answers to the second and third questions found the defendant's negligence. It is undisputed that the plaintiff knew of the uncovered and exposed condition of the saw.

True, the fourth question submitted related to the knowledge, expectation, or foresight of the plaintiff, instead of a man of ordinary prudence and intelligence in the exercise of ordinary care. Upon that question the court charged the jury that the plaintiff "had been at work at the place in question fifteen or sixteen days, and while so engaged it was his duty to use reasonable care, in examining his surroundings, to observe and take such knowledge of dangers as could be obtained by observation. He is presumed to have known all such risks and dangers as were open and apparent to a person of ordinary intelligence, in view of his age, experience, and means of observation, and which usually attend such employment. But he is not presumed to have known every possible danger of injury that might exist. . . . Taking all the evidence in the case into consideration, if you believe plaintiff knew, or as a reasonably prudent man ought to have known and foreseen, the danger or risks of injury to him while performing his duties by coming in contact with the saw as it then was, then write the proper answer in the verdict, which, in such case, would be 'Yes,' if you so find. If you believe plaintiff did not know, or as a reasonably intelligent man ought not to have expected or foreseen, the danger or risk of injury to him as stated, then your answer should be according to the fact so found. The question is not, Did plaintiff know that the saw was uncovered and

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unguarded? but is, Did he know, or ought he to reasonably have known, the risk or danger of injury resulting therefrom?" The court also properly instructed the jury as to the meaning of "ordinary care" and "ordinary care and prudence," and that the defendant was not bound to provide against every possible accident, nor insure against accident. Under the charge the jury necessarily found that the plaintiff, as a man of ordinary prudence and intelligence, in the exercise of ordinary care, in view of "his age and experience in sawmills," ought not to have known, nor reasonably to have expected or foreseen, that he was liable to sustain such injury while in the performance of his duties. The answers to the third and fourth questions are not contradictory. The portions of the charge quoted are applicable to the case, and justifiable.

We find no reversible error in the record.

By the Court.— The judgment of the circuit court is affirmed.

MARSHALL, J. I concur in the decision of this case, governed by the principle of *res adjudicata*. On a former appeal, on the same evidence, the court held that the question of whether plaintiff assumed the risk by reason of his knowledge of the existence of the uncovered saw was for the jury. Right or wrong, that decision is binding in this case on this appeal.

BARDEEN, J., took no part.

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BERNHARDT, Respondent, vs. RICE, imp., Appellant.

February 11 — March 1, 1898.

Liens on logs and lumber: Assignment: Trusts: Evidence.

1. In an action to enforce a lien upon lumber, etc., under ch. 139, Laws of 1891, evidence that after plaintiff commenced to do the work in defendant's mill, for which the lien was claimed, the mill was in operation cutting lumber; that there were manufactured inch and two-inch hemlock lumber, chair stock, wagon tongues, and the like; and that this was the lumber upon which the lien was claimed, is *held* sufficient to sustain a finding that plaintiff's work was performed in manufacturing *logs* and *timber* into planks, etc.
2. The log-lien law (ch. 139, Laws of 1891) being an independent enactment and not a part of ch. 143, R. S. 1878, and specific provision having been made in it that claims for liens not represented by time orders can be assigned only to persons claiming a lien upon the same property, *it would seem* that a log lien is not assignable under sec. 3816, R. S. 1878, making a claim for lien under said ch. 143 (which originally covered the subject of log liens) assignable.
3. An instrument, in form an assignment of a log-lien claim, by the terms of which the assignee was to collect the claim and out of the proceeds pay the expenses of collection, then pay certain of the assignor's debts, including a debt to the assignee, and turn over the balance to the assignor, did not amount to an assignment or transfer of the right to the lien so as to destroy the lien, but created certain express trusts in favor of the assignor, who remained the real owner of the claim, with power to control the same at all times. *Caldwell v. Lawrence*, 10 Wis. 331, and *Tewksbury v. Bronson*, 48 Wis. 581, distinguished.

APPEAL from a judgment of the circuit court for Marathon county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

This is an action to recover for labor in a sawmill, and to enforce a lien upon 60,000 feet of lumber which was manufactured in the mill. The defendant Stevens was the owner of the mill, and was the original defendant, and the defendant *Rice* was afterwards interpleaded, and filed an answer, claiming to own the lumber which was attached. The facts in the case were simple and practically undisputed.

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The plaintiff went to work October 28, 1895, for the defendant Stevens, at his mill, called the Norwegian mill, in Marathon county. The plaintiff was a millwright, and first repaired the mill and got it ready to run, which work occupied two months; and, after it commenced to run, he took care of the mill and did the filing of the saws. He worked ninety-eight and one quarter days at $2.25 per day, and stopped March 3, 1896, at which time there was due him $221.06 for his labor, and he then received from Stevens $110.41, leaving due the balance of $110.65, which has never been paid. While the mill was in operation and the plaintiff was in charge of it, doing the filing, there was manufactured in the mill a quantity of inch and two-inch hemlock lumber, chair stock, wagon tongues, and dimension lumber, principally of hard wood. About 60,000 feet of this lumber was attached by the plaintiff in this action. On the 9th of March, 1896, the plaintiff filed his petition for the lien, which it is unnecessary to set forth, as there is no claim but that it was a sufficient petition. Upon the same day, and after filing the petition, the plaintiff and one Graebel executed the following agreement:

"This agreement, made and entered into by and between *Frank Bernhardt*, party of the first part, and Nic. Graebel, party of the second part, witnesseth:

"That WHEREAS, first party has a claim of $110.65 against Alonzo Stevens, for work and labor performed by first party as a millwright during this winter season; and WHEREAS, there has an action been brought by the Mathie Brewing Co. against first party, defendant, and said Alonzo Stevens, garnishee, in which action said garnishee has been adjudged to pay said Mathie Brewing Co., on the 26th day of May, 1896, the sum of $81.20; and

"WHEREAS, party of the first part, being entitled to the said sum of $81.60 as exempt from execution and garnishment, has entered into a settlement with the said Mathie

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Brewing Co., whereby he agrees to pay $25.00 to said Mathie Brewing Co., upon discharge of said Alonzo Stevens from garnishment, and out of said claim against Stevens when collected; and

"WHEREAS, the party of the second part has a claim against the first party of $25.00, balance upon a debt evidenced by order given to him by first party upon said Stevens for $50.00, of which Stevens had paid $25.00:

"NOW, THEREFORE, the first party hereby transfers, sells, and assigns all his right, title, and interest, and mainly his right to file and foreclose a lien upon certain lumber being at the said Stevens' mill, the so-called Norwegian mill, in the town of Easton, Marathon county, in the manufacture of which first party has been employed by said Stevens, to the second party, in consideration as follows:

"First. Party of the second part shall collect said claims, and, if necessary, employ an attorney, and pay out the necessary expenses for the collection of said claim.

"Second. Out of the proceeds of said collection, the second party shall first deduct expenses, then take out the $25.00 balance due him on his claim.

"Third. Out of the residue, the said party shall pay to the said Mathie Brewing Co., to be applied upon their judgment against first party rendered in the case aforementioned, the sum of $25.00.

"Fourth. The balance then remaining the party of the second part shall be obliged to pay over to party of the first part."

On the 25th of March, 1896, the parties made another agreement, purporting to terminate the first agreement, which was indorsed thereon, and is as follows:

"It is hereby understood and agreed, upon valuable consideration, that the agency and interest and powers attempted and intended to be created in and conferred upon Nic. Graebel by the agreement of which the foregoing is a

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copy is hereby terminated, leaving the said *Frank Bernhardt* in every respect in the same position as if the said agreement had not been entered into at all."

Upon the same day that this second agreement was signed and executed, this action was commenced.

The court found the facts substantially as above stated, and that the amount of $110.65 due the plaintiff was for labor in and about the manufacture of logs and timber into lumber, and that the lumber attached in this action was a part of the lumber so manufactured, and that the plaintiff was entitled to judgment against Stevens for the amount due him, with interest, and was also entitled to a lien therefor upon the lumber attached. From a judgment in accordance with this finding *Rice* appeals.

For the appellant there was a brief by *Mylrea, Marchetti & Bird*, and oral argument by *C. B. Bird.*

For the respondent there was a brief by *Otto Kreuger* and *Bump, Kreutzer & Rosenberry*, and oral argument by *M. B. Rosenberry.* They argued, among other things, that the agreement with Graebel was not by its terms a legal assignment. *Bernhardt* reserved to himself the ownership of the claim which he transferred to the control of Graebel merely for the purpose of collection. Under the most favorable construction the latter had but an equitable interest in it. This the respondent might legally do without losing his lien. *Murphy v. Adams*, 71 Me. 113; *Eaton v. Alger*, 47 N. Y. 345, 349; *Edwards v. Campbell*, 23 Barb. 423; *Eaton v. Alger*, 57 id. 179; *Fairbanks v. Sargent*, 6 L. R. A. 475, 117 N. Y. 320; *Caldwell v. Lawrence*, 10 Wis. 331.

WINSLOW, J. The first contention made by the appellant is that the present log-lien law (Laws of 1891, ch. 139) only gives a lien to one who manufactures *logs* or *timber* into lumber, and that the evidence shows that the material which was sawed at the mill in question was *lumber*, and that

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it was manufactured into dimension stuff, planks, wagon tongues, etc., and hence that there is no lien. The court found, however, that the plaintiff's work was performed in manufacturing *logs* and *timber* into planks, dimensions, wagon tongues, etc. While the evidence is very meager on the point, we regard it as sufficient to warrant the finding. The plaintiff's evidence was uncontradicted, and he states that, after the mill started to run, he took care of it and did the filing, and that after he commenced to do the filing the mill was in operation cutting lumber; that there were manufactured inch and two-inch hemlock lumber, chair stock, wagon tongues, and the like; and that this was the lumber upon which he claimed a lien. In the absence of all other evidence, we think the reasonable inference from this testimony is that the lumber on which the lien is claimed was cut from logs or timber; so this contention must be overruled.

The appellant's second contention is that the plaintiff lost his lien by the assignment thereof to Graebel, who had no claim for a lien upon the property. It seems probable that a log lien is not assignable under sec. 3316, R. S. 1878, which makes a claim for lien under ch. 143, R. S. 1878, assignable. Although this chapter contained provision for log liens, the entire subject of such liens was revised and codified by independent subsequent legislation, and the former provisions contained in the Revised Statutes repealed. See Laws of 1889, ch. 413, and Laws of 1891, ch. 139. The last of these laws is not an amendment to ch. 143, R. S. 1878, but is an independent chapter, and in it specific provision is made for assignment of time checks and time orders, as well as of log-lien claims generally; but the assignment of a claim not represented by a time check or time order can only be made to persons who claim a lien upon the same property. Under familiar principles, these provisions, being specific, seem to limit and control the general

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provisions contained in sec. 3316 of ch. 143, R. S. 1878, especially in view of the fact that the present log-lien law is not a part of ch. 143. However, we do not regard the agreement with Graebel as an assignment or transfer of the right to a lien, within the meaning of the rule laid down in *Tewksbury v. Bronson*, 48 Wis. 581. While the language of the agreement is that of an assignment, it will be readily seen that the plaintiff still retained the beneficial interest in the lien. The claim and lien were not transferred to Graebel as his property to do with as he chose, but simply for the purposes of collection and application of the proceeds in a specified way for the benefit of *Bernhardt*. Graebel was to pay the expenses of collection, then pay certain of *Bernhardt's* debts, and pay the balance to *Bernhardt*. The legal effect unquestionably was that Graebel became a trustee of certain express trusts, and that *Bernhardt* became the *cestui que trust*, and remained the real owner of the claim and lien, and could compel the execution of the trust duties of Graebel, all of which were for *Bernhardt's* benefit. It can make no difference that one of the debts to be paid was an indebtedness to Graebel himself. Graebel's debt was not discharged or paid by the so-called "assignment." *Bernhardt* could pay Graebel's debt at any time, and thus extinguish any rights acquired by Graebel. Thus, it appears clearly that *Bernhardt* was the real party in interest, and had the power of controlling the claim at all times. The early cases in this court (*Caldwell v. Lawrence*, 10 Wis. 331, and *Tewksbury v. Bronson*, 48 Wis. 581) which hold claims for liens not to be assignable are cases of legal transfers by absolute assignment, and are clearly distinguishable from the case at bar.

By the Court.— Judgment affirmed.

BARDEEN, J., took no part.

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BILLINGS, Appellant, vs. ONEIDA COUNTY, Respondent.

February 11 — March 1, 1898.

(1) *District attorney: Recovery for extra services.* (2) *Appeal: Review of findings.*

1. A district attorney cannot recover for services performed for his county in prosecuting appeals to the supreme court, where such services were rendered without expectation of receiving pay therefor, and both parties supposed at the time that they were rendered under his general employment as district attorney.
2. Findings of fact by the trial court cannot be reviewed on appeal in the absence of a bill of exceptions.

APPEALS from judgments of the circuit court for Oneida county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

This is an appeal from the judgment of the circuit court for Oneida county, affirming the action and decision of the county board of supervisors of that county in wholly disallowing plaintiff's account for services rendered by him as attorney in prosecuting an appeal to this court in the case of *T. B. Scott Lumber Co. v. Oneida Co.* 72 Wis. 158, and the amount claimed was $180. There was no formal issue joined, the plaintiff's account filed constituting the complaint, which was deemed denied by the defendant under the statute, R. S. 1878, sec. 685. The case came on to be tried at the same time with another like appeal taken by the plaintiff from the disallowance of an account for similar services rendered in the case of *Alexander v. Oneida Co.* 76 Wis. 56, where the sum claimed was $198. Both appeals were tried at the same time.

It appeared that in 1888, and while the plaintiff was district attorney of said county, a large number of actions were commenced against the county upon county orders, and other actions of an equitable nature were instituted to set aside taxes and tax sales, and to cancel tax certificates and county orders. The plaintiff, as such district attorney, was

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the attorney for the defendant in all said actions, and a number of appeals were taken to this court, and the plaintiff was authorized by the county board, as such district attorney, to take and prosecute the appeals mentioned in said accounts in the supreme court. The plaintiff, being at the time and afterwards district attorney, did not present his account to the defendant for such services until February, 1894, and, as the decision of the circuit court was not rendered until plaintiff was again elected to the office of district attorney, a delay occurred in bringing these appeals. The cases were tried upon a stipulation of facts, not contained in the record. The court found, upon the issues thus presented, for the defendant, and, among other things, that at the time the plaintiff performed the said services he supposed that it was his duty as district attorney to prosecute the said appeal without other compensation than his salary as such officer, and presented no claim therefor until as aforesaid. And as conclusions of law the court found that, the services claimed having been rendered by plaintiff without expectation of receiving pay therefor, and both the plaintiff and defendant at the time supposing that the services were rendered under the general employment of the plaintiff as district attorney, the law would imply no promise to pay for such services; and that the plaintiff could not recover.

Judgment was rendered in both cases on such findings in favor of the defendant. There was no bill of exceptions in either case. From these judgments the plaintiff appealed.

For the appellant there was a brief by *Levi J. Billings*, attorney, and a brief in reply by *Lewis & Briggs*, and oral argument by *Mr. Billings* and *Mr. H. M. Lewis*.

Sam. S. Miller, for the respondent.

PINNEY, J. At the time of the rendition of the services in question, the case of *Eagle River v. Oneida Co.* 86 Wis.

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266, had not been decided. In that case it was held that the statute (R. S. 1878, sec. 752) making it the duty of the district attorney "to prosecute or defend all actions, civil or criminal, in which the state or county is interested or a party in the circuit court," was not applicable to such cases on appeal in the supreme court; and it is said that up to that time a difference of opinion among attorneys prevailed as to what was the law on this subject. The contention of the defendant is that the services were rendered by the plaintiff without expectation of receiving pay therefor, and that both plaintiff and defendant supposed at the time that they were rendered under the general employment of the plaintiff as district attorney. The circuit court found accordingly, and that no promise could be implied to pay for such services. Upon this ground the plaintiff's right of recovery was denied. As already stated, there was no bill of exceptions in the case, and, of course, no exceptions to the finding. As the pleadings — or what the law considers such — and the findings support the judgments appealed from, whether the court arrived at a correct conclusion cannot now be reviewed. *Treloar v. Osborne*, *ante*, p. 461.

By the Court.— The judgments appealed from are affirmed.

BARDEEN, J., took no part.

QUAW, Respondent, vs. PAFF, imp., Appellant.

February 11 — March 1, 1898.

County officers: Salary: Recovery of money unlawfully paid as extra compensation: Action by taxpayer.

A county treasurer made a claim against his county for about $500 for extra services which were in fact within the line of his official duty, and the claim was allowed by the county board, and the

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money withdrawn by him from the county funds. After demand of, and refusal by, the county board, to compel a return of the money, this action was brought by plaintiff in his own behalf, and that of other taxpayers, to charge such treasurer as a trustee of such money, and to compel him to account for the same and pay it into the county treasury. *Held*, on a demurrer to the complaint setting up the facts:

(1) A salaried county officer, for the performance of the duties of his official position and service which he performs voluntarily as such officer by request of the governing body of the corporation, is entitled to his salary only.

(2) An officer who obtains public money from the treasury by forms of law, ostensibly for extra services, but to which he has no right in fact, does not thereby obtain title to such money, and on a failure of the proper officers to respond favorably to a demand by a taxpayer to compel a return of such money, such taxpayer may, acting in his own behalf and in behalf of other taxpayers, maintain an action to charge such officer as a trustee of such money, and to compel him to account for the same and pay it over to the rightful owner.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Marathon county: CHAS. M. WEBB, Judge. *Affirmed.*

Action to declare and enforce a constructive trust. The material allegations of the complaint are, in substance, as follows:

From and after the first Monday of January, 1895, defendant *Paff* was county treasurer of Marathon county, and plaintiff a taxpayer of such county. The action was brought by plaintiff in his own behalf, and in behalf of all other taxpayers of the county similarly situated. At the annual November (1895) meeting of the county board of supervisors of the county, there was allowed to the treasurer, *Paff*, on bills filed by him, $475 for clerk hire, and $28.92 for posting tax-sale notices. Thereafter *Paff* withdrew from the county funds the amount so allowed to him, and converted the same to his own use. He did not perform any service as a consideration for the money so allowed to him, except such as

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he was required to perform because of his official position. The sum so allowed and drawn formed no part of his salary as fixed by law before he entered upon the duties of his office. He, and the members of the county board, when his claim was allowed and the money drawn from the public funds, knew that he was neither legally nor equitably entitled to the same. In May, 1896, plaintiff, in behalf of himself and other taxpayers, demanded of *Paff* that he return the money so illegally drawn as aforesaid, which demand has not been complied with. At a meeting of the county board held in June, 1896, a request in writing, made by plaintiff in behalf of himself and other taxpayers, was presented to the county board to take the necessary proceedings to recover of *Paff*, for the benefit of the county, the money so drawn as aforesaid, offering at the same time to indemnify the county against all costs of the necessary legal proceedings. The request was indefinitely postponed by the board.

The judgment prayed for, among other things, is that defendant be required to return the money illegally drawn by him from the public funds, and that plaintiff have such other relief as might be deemed just and equitable.

To the complaint the defendant *Paff* interposed a demurrer upon the following grounds: (1) For want of jurisdiction of the subject of the action; (2) for want of legal capacity to sue; (3) for defect of parties plaintiff; (4) for defect of parties defendant; (5) for failure to state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appealed.

The cause was submitted for the appellant on the brief of *Bump, Kreutzer & Rosenberry*, and for the respondent on separate briefs by *Mylrea, Marchetti & Bird* and *Brown & Pradt.*

Counsel for the appellant contended, *inter alia*, that it does not belong to the jurisdiction of a court of equity to revise or control the determination of the county board in

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its examination and allowance of accounts against the county. The facts set forth in the complaint do not bring the case within any acknowledged or defined head of equity jurisprudence. *Pedrick v. Ripon*, 73 Wis. 624; 1 Pomeroy, Eq. Jur. § 112; *Willard v. Comstock*, 58 Wis. 565; *Sage v. Fifield*, 68 id. 552. All the cases in this court, where the action has been sustained at the suit of a taxpayer to set aside illegal corporate acts and to require funds or property to be restored, including the case of *Frederick v. Douglas Co.* 96 Wis. 411, were cases where preventive relief was asked as the basis of the suit. A taxable inhabitant, as such, cannot maintain an action to avoid corporate acts, not affecting his private interest as distinct from that of other inhabitants. *Roosevelt v. Draper*, 23 N. Y. 318; *People v. Fields*, 58 id. 509; *Smith v. Heuston*, 6 Ohio, 101; *Kilbourne v. St. John*, 59 N. Y. 21.

MARSHALL, J. It is not contended on the part of the appellant that there was any legal or equitable claim against Marathon county as a basis or consideration for the money which, under the forms of law as set forth in the complaint, he drew from the county treasury and still retains. Indeed, no such claim can be made in face of the express statutory prohibition against any increase of the salary of a county officer during his term of office (sec. 694, R. S. 1878), and in face of the repeated decisions of this court, that that wholesome provision of law cannot be successfully evaded, so as to be beyond remedy, by any such means as that of making an allowance for clerk hire (*Rooney v. Milwaukee Co.* 40 Wis. 23), or an allowance for the performance of some specific act really belonging to the duties of the office (*Jones v. Grant Co.* 14 Wis. 518), or an allowance for expenses (*Crocker v. Brown Co.* 35 Wis. 284), or by any other of the many ways that have been resorted to by officers to obtain possession of public money, ostensibly as compensation for

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some public service outside of their official duties. Officers take their offices *cum onere*, and can acquire no right, legal or equitable, to a salary in excess of that provided and fixed by law before they enter upon their official duties. Whether the salary incident to an office be adequate or inadequate is entirely immaterial. The officer accepting an office has no right to demand more for the performance of its duties, or the performance of any duty, as such officer, not required by law, but which may be required of him by the governing body of the corporation and voluntarily performed. All services performed, which are within the scope of his official duties, or which are voluntarily performed as such officer by request or otherwise, are, in contemplation of law, covered by his official salary. *Kewaunee Co. v. Knipfer*, 37 Wis. 496. Though he may by some means obtain possession of public funds as additional compensation, and by permission of the governing body of the corporation, the title of the money thus obtained does not thereby change from the public to him. He thereby places himself in the position of one holding money to which he has no right, and which, by every principle of legal and equitable duty as well, he is required to return to its rightful owner and possessor.

It follows from the foregoing that the complaint shows that the appellant, by means and ways unlawful and void, drew from the county treasury and converted to his own use over $500 of public money which should be returned. He is liable personally therefor, and, as he was the official custodian of the funds in the first place, is liable for the same on his bond as well (*Kewaunee Co. v. Knipfer*, *supra*), just in all respects as if he had taken the money in any other unlawful way.

The question of whether plaintiff, acting in behalf of himself and all other taxpayers, has legal capacity to maintain this action to charge the unlawful holder of public money as trustee thereof for the rightful owner, and to compel him

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to account therefor and pay the same over to such owner on the facts stated in the complaint, was considered and decided in *Frederick v. Douglas Co.* 96 Wis. 411. Under the rule there laid down, the demurrer to the complaint under consideration was properly overruled on all points urged against it. A rediscussion of the principles involved at this time, it is considered, would not render the doctrine upon which such actions are maintainable more plain than by a reference to what was there said. It is fully recognized that there is some conflict of authority on the subject, but it is believed that the weight of authority, and certainly the better reasoning, supports the decision of this court. That a stockholder of a private corporation can, where its officers misuse the corporate funds and the governing body refuses to proceed to remedy the wrong, maintain an action in his own behalf and that of the other stockholders against the delinquent official for the benefit of the corporation, is not questioned anywhere, and no good reason can be assigned why the taxpayers of a public corporation should have a less measure of protection. Certainly, public officers should act up to the highest standard of official integrity, and the remedies to compel that result should be as ample to meet the exigencies of all situations as the remedies between private corporations, their stockholders and officers. A full understanding of the existence of the remedy by action on behalf of taxpayers, for the benefit of a public corporation, to compel a person who has unlawfully transferred money from the public treasury where it belongs, to his own pocket where it does not belong, will have a most salutary effect in promoting the highest attainable standard of fidelity to public trusts on the part of officials. By it they will be admonished at all times and under all circumstances that the title to public money does not change and become private property through mere forms of law, or change of location, or otherwise than for legitimate public purposes and in the manner

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provided by law. There are no equitable considerations here to estop plaintiff from maintaining this action to compel a return of the money wrongfully obtained, as existed in *Frederick v. Douglas Co., supra.* The action was seasonably brought, the appellant rendered no service for the money he obtained, and has in no way suffered by reason of laches on the part of the plaintiff or any taxpayer of the county.

By the Court.— The order of the circuit court is affirmed.

ARON, Appellant, vs. THE CITY OF WAUSAU, Respondent.

February 12 — March 1, 1898.

(1) *Riot: Common intent.* (2) *Municipal corporations: Liability for injuries caused by explosion of firecrackers in street.*

1. In order to constitute an unlawful assembly or riot under sec. 4511, R. S. 1878, the three or more persons engaged therein must have a common purpose to do the act complained of.
2. A complaint alleging that plaintiff was injured, while driving along a street in the defendant city on the evening of the Fourth of July, by the explosion of a cannon cracker, or explosive article, or bomb, thrown and exploded by someone among a crowd of thirty or more people who were obstructing the sidewalk, and unlawfully and in a tumultuous manner engaged in exploding firecrackers, etc., which were dangerous unless handled with extreme care, but not alleging or containing anything to indicate that the crowd, or any three or more persons therein, had any common intent or purpose to injure the plaintiff or any other person by the explosion in question, does not state a cause of action against the city under sec. 938, S. & B. Ann. Stats., making cities liable for injuries done by mobs or riots.

APPEAL from an order of the circuit court for Marathon county: O. B. WYMAN, Judge. *Affirmed.*

For the appellant there was a brief by *Silverthorn, Hurley, Ryan & Jones*, and oral argument by *W. C. Silverthorn.*

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They contended, *inter alia*, that the common purpose of the crowd was to do acts which were in violation of law and in disturbance of the public peace by exciting fear, alarm, and consternation among the people. Such common purpose is unmistakably implied by the conduct of the crowd, and the riot consisted in actually carrying out that purpose. It is not claimed that the common purpose was to assault or injure the plaintiff particularly, but the common purpose was to do the acts which resulted in the injuries to the plaintiff. See *Bonneville v. State*, 53 Wis. 680; *State v. Snow*, 18 Me. 346; *Solomon v. Kingston*, 24 Hun, 562; *State v. Straw*, 33 Me. 554; *State v. Boies*, 34 id. 235; *Higgins v. Minaghan*, 78 Wis. 602; *S. C.* 76 id. 305; *Palmer v. Concord*, 97 Am. Dec. 605; *Allegheny Co. v. Gibson*, 35 Am. Rep. 670, 90 Pa. St. 397; *Gianfortone v. New Orleans*, 24 L. R. A. 592, and note; Stephen, Dig. Crim. Law, art. 73; 20 Ency. Brit. 564.

For the respondent there was a brief by *C. B. Bird*, attorney, and *Mylrea, Marchetti & Bird*, of counsel, and oral argument by *Mr. Bird*. They argued, among other things, that the amendment of 1887, under which this liability is claimed, was passed immediately after the Milwaukee riots of 1886, and must be construed in the light of current history to ascertain the legislative intent. These statutes generally were intended to provide compensation for damages resulting from local insurrections and disturbances, popular uprisings and excesses, beyond the control of local authorities, evidencing an intention of the populace to take the law into their own hands, and exceeding ordinary violations of law, breaches of the peace, etc. It is to such occurrences that similar statutes have been applied. *Allegheny Co. v. Gibson*, 90 Pa. St. 397, 35 Am. Rep. 670; *Gianfortone v. New Orleans*, 61 Fed. Rep. 64, 24 L. R. A. 592, and cases in note. The obvious intention of the legislature, in the light of the result intended, must govern. *Haentze v. Howe*, 28 Wis. 293. No case is found applying the statute to such occurrences as

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the complaint alleges. *Duryea v. New York*, 10 Daly, 300. To say that the firing of cannon crackers on the Fourth of July by a crowd of idle persons, boys, and youths for their amusement and sport, and even the throwing of them at occasional passers-by, one of the most common and ordinary pastimes on that day, though perhaps reprehensible and dangerous, is an act, either lawful or unlawful, done in "a violent, unlawful, and tumultuous manner to the terror and disturbance of others," within the meaning of this statute, would be an extension of a criminal statute far beyond its obvious and reasonable intent. Sec. 4511, R. S. 1878, being a criminal statute, is to be strictly construed. It is apparently intended simply to retain the common-law crime of riot. *Bonneville v. State*, 53 Wis. 680. An essential element of this crime is "some sort of resistance to lawful authority." *Reg. v. Hunt*, 1 Cox, Crim. Cas. 177; 1 Hawkins, P. C. ch. 28, sec. 4 (p. 513); 4 Stephen, Comm. (9th ed.), 215; 2 Roscoe, Crim. Ev. (7th ed.), 901; *U. S. v. Peaco*, 4 Cranch, C. C. 601; *Duryea v. New York*, 10 Daly, 300.

CASSODAY, C. J. This is an appeal from an order sustaining a demurrer to the complaint upon the ground of insufficiency. Of course, the demurrer admits the issuable facts alleged in the complaint, but does not admit mere conclusions of law from the facts so alleged. *Pratt v. Lincoln Co.* 61 Wis. 62; *Williams v. Williams*, 63 Wis. 72; *Stone v. Oconomowoc*, 71 Wis. 155, 159; *Brown v. Phillips*, 71 Wis. 239; *Palmer v. Hawes*, 73 Wis. 50; *Meggett v. Eau Claire*, 81 Wis. 329; *Peake v. Buell*, 90 Wis. 508.

The issuable facts so alleged and admitted are to the effect that July 4, 1896, between 6 and 7 o'clock in the evening, the sidewalk along the west side of Third street, and in and along Third street between Scott street and McClellan street, in Wausau, was occupied by a crowd of thirty or more persons, then and there being and blocking up and obstructing

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the sidewalk and street, and unlawfully hindering and preventing the plaintiff and others from freely passing along the sidewalk and street, and unnecessarily, and unlawfully, and contrary to the city ordinance and the statutes, engaged in exploding, and who did unnecessarily and unlawfully explode, firecrackers and other fireworks, and did unnecessarily and unlawfully throw in the street squibs and other articles containing powder and other explosives, such as giant powder, dynamite, nitro-glycerine, and gun cotton inclosed in strong, heavy pasteboard and strong paper, with cement, constituting what is called and known as "cannon crackers" or "American firecrackers,"—in fact, dynamite bombs,—which were dangerous to human life and safety, unless handled with extreme care; that such explosions took place without restraint, in a violent, unlawful, and tumultuous manner, to the terror and disturbance of others and this plaintiff; that while this plaintiff, an unmarried woman, was riding with her brother in a one-horse buggy in a quiet manner at the time and place mentioned among the persons so assembled, without knowing of the danger and without any negligence on her part, she was struck upon her head and face by one of the cannon crackers or explosive articles or bombs thrown and exploded by some one in the crowd, to the plaintiff unknown, and severely injured by wholly destroying one of her eyes, and greatly impairing her other eye, to her damage in the sum of $20,000, for which she prayed judgment.

Thus stripped of allegations and conclusions of law, and of arguments and exaggerations, the facts alleged in the complaint are few and simple. The city contained more than 10,000 inhabitants. It is of common knowledge that, in such a city, crowds assemble in the streets and on the sidewalks on the Fourth of July, and explode firecrackers, cannon crackers, and other combustible materials. In the instant case the explosion was violent and in a tumultuous manner, to the terror of the plaintiff and others. The un-

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known person who so recklessly threw and exploded the cannon cracker which so cruelly injured the plaintiff is not a party to this action, and, of course, his liability is not before us for consideration. The only question here for consideration, upon the merits, is whether the city is liable. The explosion was in violation of an ordinance of the city, which, by its terms, the mayor and common council had power to suspend on the Fourth of July, but which had not been suspended. The complaint alleges that the crowd was an unlawful assemblage,— a riot and a mob,— and in violation, not only of the ordinance, but of the statute. The statute gives a remedy against the city for any bodily harm or injury sustained in consequence of any mob or riot, by any person not implicated therein, and whose act or negligence in no way contributed thereto. Sec. 938, S. & B. Ann. Stats. The statute also provides that "any three or more persons, who shall assemble in a violent or tumultuous manner to do an unlawful act, or, being together, shall make any attempt or motion towards doing a lawful or unlawful act, in a violent, unlawful or tumultuous manner, to the terror or disturbance of others, shall be deemed an unlawful assembly; and if they commit such acts in the manner and with the effect aforesaid, they shall be deemed guilty of a riot." Sec. 4511, R. S. 1878.

It will be observed that the "three or more persons" must be so assembled "to do an unlawful act," or, being so assembled, shall attempt to do "a lawful or unlawful act, in a violent, unlawful, or tumultuous manner, to the terror or disturbance of others," in order to constitute "an unlawful assembly;" and then, "if they commit such acts in the manner and with the effect aforesaid, they shall be deemed guilty of a riot." In other words, to constitute such unlawful assembly, the three or more persons must have a common purpose to do the act complained of, and, if they commit such act with such common purpose or intent, then they

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are to be deemed guilty of a riot. A distinguished text writer, adopting the definition taken from the Draft Report of the English Commissioners of 1879, says: "An unlawful assembly is an assembly of three or more persons who, *with intent to carry out any common purpose*, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighborhood of such assembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly, and without any reasonable occasion, provoke other persons to disturb the peace tumultuously." 2 Whart. Crim. Law (10th ed.), § 1535. "A riot is the tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of *some private object*. . . . If it be to resist a statute, but not to overthrow government, then, in the United States, . . . the offense is not treason, though it may be riot or a high misdemeanor." Id. § 1537.

There is nothing in the complaint to indicate that the crowd in the street, or on the sidewalk, or any three or more persons in the crowd, had any common intent or purpose to injure the plaintiff or any other person by the explosion of the cannon cracker in question. It was thrown and exploded by some one unknown to the plaintiff. Others were throwing and exploding firecrackers, but each person was, apparently, the sole manipulator of his own firecracker, and there was no common intent or purpose, of any three or more persons, to explode any particular firecracker, much less to injure the plaintiff or any other person by such explosion. It is equally apparent that it was not a mob.

By the Court.— The order of the circuit court is affirmed.

BARDEEN, J., took no part.

See note to this case as reported in 40 L. R. A. 733.— REP.

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CURRAN, Respondent, vs. A. H. STANGE COMPANY, Appellant.

February 12 — March 1, 1898.

Master and servant: Injuries to carriage rider in sawmill: Incompetent sawyer: Promise to change: Assumption of risk: Court and jury: Evidence: Mental conclusions: Statements to physician: Permanency of injuries: Pleading: Instructions: Special verdict: Immaterial errors: New trial: Newly discovered evidence.

1. Incompetency of a sawyer may arise from mere lack of practice for several years as well as from never having operated a saw carriage at all.
2. Plaintiff, after working one night in defendant's sawmill as carriage rider, informed the superintendent that the sawyer was incompetent. The next evening he went to work with the same sawyer in charge, in reliance, as he claimed, upon the superintendent's promise, made that morning, to get another sawyer, and was injured about two hours thereafter by reason of the unskilful manner in which the carriage was operated. *Held*, that under all the circumstances it was a question for the jury whether plaintiff had assumed the risk arising from the incompetency of the sawyer, either by continuing in the employment after the lapse of a reasonable time for the change of sawyers to be made as promised, or because the danger was so great and immediate that he was not justified in working at all on the second evening.
3. All the facts and circumstances surrounding plaintiff at the time he commenced to work the second evening were admissible as explaining why he went to work and whether his act was reasonable; and the fact that, after having stated that he was still relying upon the superintendent's promise, he was permitted to elaborate such statement of his mental condition or conclusions in connection with his testimony as to the facts upon which they were based, is *held* not to have been prejudicial.
4. Testimony of physicians who treated plaintiff for his injuries, based in part upon statements as to his pains and feelings, made by him for the purpose of medical treatment, is *held* admissible.
5. Testimony of a physician that, so far as he was able to know, he would say that plaintiff's injuries were permanent, was admissible.
6. A complaint alleging that numerous injuries to plaintiff's head, back, and spine were received, and that "other serious injuries were done him," is *held* sufficient, in the absence of a motion to

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make more definite and certain, to warrant the admission of evidence that plaintiff's eyesight and hearing were impaired.

Where there was little conflict in the evidence except concerning the promise to discharge the incompetent servant, upon which question the jury were properly instructed, a refusal to instruct that they were not bound to credit the testimony of the plaintiff, even in matters where he was not contradicted by any witness, is *held* not to have been error.

8. An instruction that the jury should find a verdict upon the *preponderance* of the evidence is *held* not to have been error, where they were further told in the same connection that they should make their answers in accordance with their *conviction* or *belief*, from the evidence, as to what the truth really was.
9. The use of the word *ought* instead of *would* in a question of the special verdict as to whether the danger to plaintiff by reason of the incompetent sawyer was so great that a reasonably prudent man, under the circumstances, *ought* not to have subjected himself to it, was not an error prejudicial to defendant, where the charge of the court upon that question used the correct word, and defendant had requested the submission of a similar question in which the word *ought* was used.
10. Where the only claim of contributory negligence was that plaintiff assumed the risk, and that issue was properly submitted and determined in the special verdict, failure to submit a general question as to whether plaintiff was guilty of contributory negligence was not error.
11. In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear that the facts upon which reliance is placed were discovered after the trial.
12. Evidence that an expert witness who had testified that he was a graduate of certain medical colleges was not a graduate of one of them would be merely impeaching evidence, and a refusal to grant a new trial on the ground that that fact was not discovered until after the former trial was therefore not error.

APPEAL from a judgment of the circuit court for Lincoln county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries. The defendant owned and operated a sawmill at Merrill, Wisconsin, which had two sawing outfits upon the main floor, each of which in part consisted of what is called a saw carriage, propelled by steam feed, and running on tracks from north

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to south, lengthwise of the mill. The plaintiff was employed on the 5th of August, 1895, to act as "carriage rider" on the west carriage and upon the night force. He went to work at 6 o'clock that night, it being the first night that this carriage was operated for the season. The force which ran each carriage was composed of three men,— a sawyer, a setter, and a carriage rider. The sawyer stood on the floor of the mill west of the carriage, and had two levers in front of him, one of which was used to start, operate, and control the saw carriage, and one was to operate what is called a "steam nigger," which rolls logs from the log deck to the carriage. The sawyer has complete control of the movements of the carriage, which he runs back and forth upon the tracks at great speed, by letting steam into the cylinder.

The duties of the setter were to stand upon the carriage near the north end, and, by means of a lever, to set the log at the proper distance from the saw, so that the lumber made as the log passed the saw would be of the proper thickness, and also to assist in dogging and undogging the logs. The carriage rider's duties were to assist in rolling the logs from the log deck to the carriage and to fasten the same by the dog levers. Both the carriage rider and the setter rode upon the carriage all the time, but had no means of controlling its movements except by signals to the sawyer.

Upon the night when the plaintiff went to work one Brown was the sawyer and one Dickenson was the setter. The plaintiff did not know Brown personally. The evidence shows that the position of sawyer is one requiring great skill and experience, and that Brown had been a sawyer in several mills for several years up to the year 1891, but since that time had done no work as a sawyer. The saw carriage was operated by these three men during the night, and the plaintiff's testimony tends to show that Brown was unable to handle the saw carriage as it should be handled; that he found it difficult, if not impossible, to stop it at the right

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points; and that it bumped frequently at the bumpers, and that it gigged back and forth, making it hard for the setter and rider to do their work.

One Elsen was the superintendent of the mill, and employed the entire crew, and was present during the night in question for a considerable time, and saw how the carriage was operating. Upon quitting work in the morning the plaintiff claims that he complained to Elsen of Brown's incompetency, and that Elsen said he guessed Brown couldn't saw, and that he would fire him, and put one Fowler on as sawyer. Elsen's testimony is to the effect that *Curran* complained of Brown, and said that he was afraid of him, and that he (Elsen) said: "Do not be afraid of him. He is supposed to be a good man, and if he don't make it I will get some one who will. I may get Fowler." Fowler was the setter upon the other carriage.

The evidence further shows that the plaintiff went home and slept that day, and returned to work in the evening, and found Brown again acting as sawyer and Dickenson as setter, but that the superintendent was not there, and that Fowler was still doing the setting upon the other carriage. The plaintiff went to work, thinking, as he claims, that probably Elsen had been unable to find any one to take Fowler's place as setter, and hence that the change had not been made on this account, but still relying upon the promise to change. About an hour after the work commenced Fowler was called away, and the day setter put in his place, and the plaintiff testifies that he thought this indicated that the change would soon be made.

About two hours after work commenced the plaintiff's saw carriage was gigged back to the log deck, and stopped, in order to turn the log. Thereupon the plaintiff undogged the log, and, being slippery, it rolled from the saw carriage onto the log deck. At this moment Brown, the sawyer, saw that his lever which controlled the carriage was not

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standing straight, as it should when the carriage was at rest, and he took hold of it to straighten it, and in so doing pulled the lever too far, and let on the steam, and the carriage started suddenly south, and went on to the end of the track. The plaintiff, being on the north end of the carriage, was thrown off between the tracks, by the sudden start, and fell down into a chute for conveying the refuse below, and between the tracks, and was severely injured.

The negligence claimed by the plaintiff was in the hiring of an incompetent sawyer, known to be such.

The jury returned the following special verdict: (1) Did the defendant use such care in selecting and hiring Brown to act as sawyer as the majority of sawmill owners or superintendents would have used under the same or similar circumstances? *Answer.* No. (2) Was Brown a competent sawyer when the defendant hired him, in August, 1895? *A.* No. (3) Was Brown a competent sawyer at the time of the accident? *A.* No. (4) If Brown was an incompetent sawyer at the time of the accident, did Elsen know, or ought he reasonably to have known prior to the accident, that Brown was incompetent? *A.* Yes. (5) On the morning of August 6, 1895, did *Curran* complain to Elsen that Brown was an incompetent sawyer, and say to him that he would not continue longer as carriage rider with Brown as sawyer? *A.* Yes. (6) Did Elsen then tell *Curran* that he would discharge Brown as sawyer and employ Fowler in his place? *A.* Yes. (7) From all the circumstances and from the conversation which occurred between Elsen and the plaintiff on the morning of August 6, 1895, would a man of ordinary intelligence have understood therefrom that Brown would be discharged and Fowler put in his place by the time the plaintiff was to begin work again? *A.* No. (8) If you answer question No. 6 in the affirmative, then, under all the circumstances, did the plaintiff continue in his said employment for a longer time than was reasonable to allow defend-

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ant to discharge Brown and employ Fowler as sawyer? *A.* No. (9) If the plaintiff's version of the conversation which occurred between Elsen and himself on the morning of August 6, 1895, is the true one, did the plaintiff begin work on the night run, relying upon the promise made to him by Elsen to discharge Brown? *A.* Yes. (10) Was the danger to be apprehended from riding the carriage in question, under Brown's management as sawyer, so great, immediate, and constant that a reasonably prudent person, acting in the light of all the circumstance under which plaintiff acted, ought not to subject himself to it? *A.* No. (11) Did a want of ordinary care on the part of Brown cause the carriage to start and injure the plaintiff? *A.* No. (12) Was the injury to plaintiff caused by the want of skill or incompetence as a sawyer on the part of said Brown? *A.* Yes. (13) Would the majority of mill owners or superintendents, under the circumstances of the situation in which Elsen was placed, have reasonably expected that the sawyer Brown, in the exercise of ordinary care, would be likely to cause injury to plaintiff by reason of his manner of handling the carriage upon which plaintiff was riding? *A.* Yes. (14) What damages has the plaintiff sustained by reason of his injuries? *A.* $5,500.

From judgment for the plaintiff on this verdict the defendant appeals.

For the appellant there was a brief by *Curtis & Reid*, attorneys, and *C. H. Van Alstine*, of counsel, and oral argument by *Mr. A. H. Reid* and *Mr. Van Alstine*. They contended, *inter alia*, that the alleged promise of Elsen to remove the sawyer and put Fowler in his place in no sense excused the plaintiff for continuing to ride the carriage with Brown as sawyer if Brown was the incompetent man he is claimed to be. A wide search through manufacturing establishments will reveal no position fraught with greater and more obvious danger than one upon a log carriage in a sawmill

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with an incompetent man at the lever. It will reveal no position where the absence of a precaution for safety will so greatly increase the danger as will the substitution of an incompetent for a competent head sawyer. As a matter of law the danger was so obvious, imminent, and great that an ordinarily prudent person would not subject himself to it. There was no such thing as a reasonable time to remove the danger other than presently and before the work proceeded further. *Erdman v. Illinois Steel Co.* 95 Wis. 6, and cases cited; *Maitland v. Gilbert Paper Co.* 97 id. 476; *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20; *Hough v. Railway Co.* 100 U. S. 213; *Indianapolis Union R. Co. v. Ott*, 11 Ind. App. 564; *Showalter v. Fairbanks, M. & Co.* 88 Wis. 376.

For the respondent there was a brief by *Flett & Porter*, and oral argument by *W. H. Flett* and *M. C. Porter*. They argued, among other things, that it is fair to presume, under all the facts and circumstances disclosed by the evidence in the case at bar, that plaintiff, or any reasonably prudent person similarly situated, may have reasonably supposed that by the exercise of extraordinary care and watchfulness on his part he could guard against and avoid any serious danger there might be of being thrown from the carriage for the limited time he might be required to do so before Elsen would make the change of sawyers. *Maitland v. Gilbert Paper Co.* 97 Wis. 476; *Greene v. M. & St. L. R. Co.* 31 Minn. 248; *Lyberg v. N. P. R. Co.* 39 id. 15; *Lyttle v. C. & W. M. R. Co.* 84 Mich. 289; *Smith v. E. W. Backus L. Co.* 64 Minn. 447; *Jensen v. Hudson Sawmill Co., ante*, p. 73; *Dells Lumber Co. v. Erickson*, 80 Fed. Rep. 257–259.

WINSLOW, J. It is claimed that this judgment should be reversed: (1) For failure to grant a nonsuit, or, in default thereof, to direct a verdict for the defendant; (2) for errors in the admission of evidence; (3) for error in refusing to give

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certain proposed instructions; (4) for errors in instructions given; (5) for error in the form of question 10 in the special verdict; (6) for failure to submit all the issues; and (7) for failure to grant a new trial. These questions will be considered in the order indicated.

1. It is claimed in the appellant's brief, although the claim was practically abandoned at the argument, that there was not sufficient testimony to show that the sawyer, Brown, was incompetent, but rather that he was out of practice, so to speak, by reason of the fact that he had not operated a saw carriage for four years. We are satisfied, however, that the evidence is amply sufficient to justify the verdict of the jury that Brown was incompetent, at the time of the accident, to handle a carriage with that skill which such work evidently requires. Whether such incompetency arises from mere lack of practice for several years, or from the fact of never having operated a carriage at all, can make no difference.

But the defendant claims that, even if the evidence was sufficient on this point, still that the plaintiff assumed the risk; that after running the first night with Brown he had ascertained Brown's incompetency; that the promise to replace Brown with another sawyer, alleged to have been made in the morning, was necessarily a promise to make that change at once; that the change not having been made when the plaintiff went to work at night, and the plaintiff knowing that fact, he could not rely upon the promise any further, but, by going to work again with Brown, assumed the risk. The further contention is made that, if Brown was incompetent, the risk which the plaintiff ran was so great and imminent that he was not justified in working at all on the second evening with Brown as sawyer, and that if he did so he voluntarily assumed the risk. Both of these propositions have been negatived by the jury, and we think there was sufficient evidence upon which the jury might rightly base

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their findings. We do not think that it can be said, as matter of law, that the risk of remaining upon the saw carriage with Brown as sawyer was so immediate and imminent that the plaintiff would be required to quit work at once or be held to have assumed the risk. It may well be that the plaintiff thought, and that a reasonable man would think, that by exercising a little more than usual care he could perform his duties upon the saw carriage safely, notwithstanding the erratic movements of the carriage. The case is certainly not like that of *Erdman v. Illinois Steel Co.* 95 Wis. 6, where there was a cracked saw, every revolution of which was fraught with the most imminent and deadly danger. Nor can it be considered, as matter of law, that the promise to place a new sawyer in Brown's place expired by limitation before the plaintiff went to work on the second evening. We think that it was properly a question for the jury to say whether, under all the circumstances, a reasonable time had elapsed for the change to be made at the time the plaintiff was injured.

2. The plaintiff was asked why he went to work upon the second night, after seeing Brown there as sawyer, and replied, under objection, that he thought that Elsen had not had time to get a setter to put in Fowler's place, and that he would be there at any minute with a new setter, and then put Fowler in Brown's place, and so he went onto the carriage; that in a short time the day setter came, and took Fowler's place, and Fowler went down stairs, and he (the plaintiff) thought that Elsen had sent for him to make some arrangement for him to do the sawing, and so he (the plaintiff) continued to work, relying upon the promise to make the change. The admission of this evidence is claimed to be error. The question was, on this branch of the case, whether the plaintiff was justified in working with Brown in reliance upon the promise to put in a new sawyer, and necessarily all the facts and circumstances surrounding the

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plaintiff at the time he commenced to work were properly admissible, as explaining why he went to work and whether his act was reasonable. But it is said that it was improper to allow him to state his mental conclusions upon these facts. We do not think, however, that this objection can prevail. The plaintiff certainly was entitled to state that he was still relying upon the promise. This was, in effect, the statement merely of a condition of mind or mental conclusion, and the fact that it is somewhat elaborated, in connection with the circumstances before his eyes, is not prejudicial.

Two physicians were called, who treated the plaintiff for his injuries, and who gave testimony, based in part upon the statements of the plaintiff, as to his pains and feelings, made for the purpose of medical treatment. The admission of this testimony is now claimed as error. This subject, however, was fully reviewed in *Keller v. Gilman*, 93 Wis. 9, where this class of testimony was held to be competent.

It is objected that the plaintiff's medical witnesses were allowed to guess at the character and permanency of the plaintiff's injuries. One of the physicians was asked whether, in his opinion, the plaintiff's injuries were permanent, and he answered that, so far as he was able to know, he would say they were permanent. A motion to strike out the answer was overruled. It is said that this is in violation of the rule that damages for permanent injuries can only be allowed where the evidence shows that they are reasonably certain to be permanent. *Hardy v. Milwaukee St. R. Co.* 89 Wis. 183. The objection is untenable. The fact that the jury must find reasonable certainty from all the evidence does not make it necessary that every witness must testify to the fact of reasonable certainty. The probative force of testimony to the effect that injuries are probably permanent may be weak, but weak testimony is not, on that account alone, inadmissible. There may be other evidence of facts and circumstances which supplements and strengthens it to

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the necessary point of certainty. *Crites v. New Richmond*, *ante*, p. 55.

Again, it is urged that it was error to allow plaintiff to testify that his eyesight and hearing were impaired since his injury; because no special claim of such injuries was made in the pleadings. The complaint, after charging that numerous injuries to the head, back, and spine were received by his fall, alleges that "other serious injuries were done him." This we regard as sufficient to justify evidence of injuries other than those specifically named. The allegation is indefinite, and probably was open to a motion to make more definite and certain, but, in the absence of any such motion, it was not error to admit evidence of injuries to the eye and ear under it.

3. The defendant requested the following instruction, which was refused: "You are not bound, as matter of law, to credit the testimony of the plaintiff, even in matters where he is uncontradicted by any witness." This is undoubtedly a correct legal proposition, and its refusal, under some circumstances, might well be error. In this case, however, there seems little or nothing to which it could rightfully apply with any force. There was really very little conflict as to matters of fact in the case, except as to the alleged promise to discharge Brown, and upon this subject the jury were properly instructed, as we shall see. We can discover no questions in the case upon which this instruction would have been useful, and hence there was no error in the refusal to give it.

4. But it is said that there was affirmative error in the charge upon the subject of the preponderance of the evidence. The trial judge, after instructing the jury that they were to answer the questions according to the fair weight and preponderance of the evidence, uninfluenced by sympathy or prejudice, charged that in answering each question they should consider and review all the evidence bearing thereon

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on either side, and that their answer should reflect, as near as possible, their deliberate conclusion based upon such evidence. He further charged as to the alleged promise by Elsen to discharge Brown: "Each has given his version of what was said. The burden of proof is upon the plaintiff to show, by the fair preponderance of the evidence, that such promise was in fact made, and, before you will be warranted in finding an affirmative answer to this question, you must find that the evidence preponderates in his favor; that is, in favor of the plaintiff's version. You should consider all the circumstances and surroundings, the interest, if any is shown, each witness has in the result of this suit, and make your answer in accordance *with the conviction that comes to you of what the truth really is. If you believe, and so find,* that the evidence preponderates in plaintiff's favor, and his version of what was said on the morning of August 6th *is true,* then your answer to this question should be in the affirmative. If the evidence as to what was said is evenly balanced, or you believe Elsen's version of it, then your answer should be in the negative." If the instruction to the effect that the jury should find a verdict simply upon the fair preponderance of the evidence stood alone, it seems that it would be reversible error, under rules frequently stated by this court. *Gores v. Graff*, 77 Wis. 174; *Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521; *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 482. There should be some instruction, in effect, that the jury are to be satisfied that the fact exists in order to justify a verdict. The charge, however, should all be construed together. In the present case, in addition to the charge that they should find a verdict upon preponderance of the evidence, the jury were plainly told, in the same connection, that they should make their answers in accordance with their conviction of what the truth really was, and that, if they *believed* that the plaintiff's version was true, they should answer in the affirmative. By these clauses they

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are told that they are to answer according to their *conviction* or *belief* from the evidence. These are fully as strong expressions as to say that they must be *satisfied* from the evidence, and they must naturally have been so understood by the jury. Taken as a whole, we do not think the charge upon this subject can be called erroneous.

A further criticism upon the charge is made to the effect that the court informed the jury what effect their answers would have upon the plaintiff's right of recovery. Examination of the charge shows that this criticism is unfounded. The court gave the jury some general instructions as to what would constitute an assumption of risk by the plaintiff, and as to the general duties of mill owners toward their employees, but nowhere told them what would be the effect of their answer to any question upon the question of the defendant's liability.

5. Question No. 10 of the special verdict reads as follows: "Was the danger to be apprehended from riding the carriage in question, under Brown's management as sawyer, so great, immediate, and constant that a reasonably prudent person, acting in the light of all the circumstances under which the plaintiff acted, ought not to subject himself to it?" It is now urged that the word "would" should have been used in the question instead of the word "ought." It is quite apparent that "would" is the strictly proper word, but was it error to use the word "ought"? We think not, for two reasons: (1) The court carefully and correctly charged the jury upon this question that if they found that the risk "was so great, immediate, and constant that a reasonably prudent man, under all the circumstances, would not have continued to ride the carriage, then it is your duty to say so by writing the proper answer to this question." (2) Substantially this same question was asked to be submitted to the jury by the defendant's counsel, with the word "ought" instead of "would" in it. While the word "ought" is in-

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accurate, it will be found frequently used in the text-books and decisions as the proper word in this connection, and as the equivalent of "would," and we do not regard its use, under the circumstances here, as prejudicial.

6. It is urged that there should have been a general question as to whether the plaintiff was guilty of contributory negligence. We find nothing in the record to call for any such finding. The only claim made upon the trial seems to have been that the plaintiff assumed the risk, and this issue was properly submitted and determined.

7. One of the plaintiff's physicians qualified himself to testify as a medical expert by testifying that he was a graduate of both Rush and Hahneman medical colleges, in Chicago. Upon the motion for a new trial, the defendant introduced an affidavit from the president of the Rush Medical College stating that the doctor was not a graduate of that college. No affidavit to the contrary was introduced, and it is now said that a new trial should have been granted upon the ground that this was newly discovered evidence. There are two answers to this objection: (1) There is nothing to show that the fact was learned after the trial of the case closed; and (2) the evidence, at most, was merely impeaching evidence. *Hooker v. C., M. & St. P. R. Co.* 76 Wis. 542.

Upon the whole record, we have found no reversible errors.

By the Court.— Judgment affirmed.

BARDEEN, J., took no part.

The rights of a servant who continues work on the faith of a promise to remove a specific cause of danger are considered in a note to *Illinois Steel Co. v. Mann* (170 Ill. 200), in 40 L. R. A. 781.— REP.

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GRIMSHAW, Plaintiff in error, vs. THE STATE, Defendant in error.

SWEET, Plaintiff in error, vs. THE STATE, Defendant in error.

February 14—March 1, 1898.

Criminal law and practice: Issuance of warrant: Presumption of regularity: Evidence: Meeting witness face to face: Reporter's transcript: Erasures: Immaterial errors.

1. A warrant, issued under the seal of a court having power to issue it, signed by the clerk, and tested in the name of the judge thereof, will be presumed to have been issued by the court or under its direction.
2. The reception in evidence, as against the plaintiff in error, of a statement or confession made in his absence by a codefendant when the latter was arrested and brought before the examining magistrate, cannot be held a prejudicial error, where the bill of exceptions, which is certified to contain all the evidence, does not contain such statement.
3. Where the statement or confession of a defendant, made before the examining magistrate, had been taken down in shorthand and afterwards transcribed by the reporter, the admission of such transcript in evidence at his trial was not erroneous because a trifling and immaterial erasure or change had been made therein, especially where such statement was fully corroborated by the testimony of the defendant at the trial.

WRITS OF ERROR to review judgments of the municipal court for the eastern district of Waukesha county: D. S. TULLAR, Judge. *Affirmed.*

C. E. Armin, for the plaintiffs in error.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *L. J. Billings.*

PINNEY, J. The plaintiffs in error were jointly charged by information with having feloniously, in the night time, on, etc., wilfully and burglariously broken and entered a certain building used and known as a chicken house, the property of one George Marx, said building not adjoining

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or occupied with any dwelling house, with intent then and there to commit the crime of larceny, in this, to wit, the goods and chattels of the said George Marx then and there being found to take, steal, and carry away, against the peace and dignity of the state of *Wisconsin*. The defendants pleaded not guilty, and, having been convicted and sentenced, each brought his separate writ of error.

Upon the writ of error brought by *Grimshaw* it was assigned as error that the warrant upon which he was arrested was illegal and void, in that it was issued by E. S. Park, clerk of the municipal court for the eastern district of Waukesha county, upon a complaint made before him for that purpose; and it was contended that the said E. S. Park, as clerk of said court, had no judicial authority to take said complaint or issue said warrant thereon.

1. The warrant was under the seal of the court, and signed by the clerk, and tested in the name of the judge thereof. By sec. 8, ch. 22, Laws of 1895, establishing said court, it is provided that the clerk of the court "may examine on oath all persons applying for warrants, and reduce their examinations to writing and file the same, and may issue all warrants and other processes from said court." Sec. 4 of said chapter provides that "the general provisions of law which may at any time be in force relative to the circuit courts and actions and proceedings therein in case of crime . . . shall apply also to said municipal court, unless inapplicable, and the rules of practice prescribed by the justices of the supreme court for circuit courts shall be in force in said municipal court; and these rules, practice and proceedings shall conform as near as practicable to the rules of practice of circuit courts; and it has power and authority to issue all process necessary to carry this practice, which process shall in substance be the same, when applicable, as used in circuit courts." Similar objection was made in *Shaffel v. State*, 97 Wis. 377, in relation to the criminal warrant issued in

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like manner by the municipal court for the western district of said county, and was overruled. It is not necessary to enter upon an examination or discussion of the powers of the clerk. It is enough that the court had power to issue the warrant. Upon its face it appears to have been so issued. If actually issued by the clerk, the presumption is that it was issued by direction of the court. There is nothing in *Pooler v. State*, 97 Wis. 627, that gives any support to this assignment of error. On the contrary, it was there treated as without merit, in view of the case of *Shaffel v. State*, *supra*.

2. It is assigned as error that the court erroneously received in evidence on the trial of *Grimshaw* the statement made before the municipal judge and the district attorney by *Ernest Sweet*, in the absence of the defendant, when he (*Sweet*) was arrested and brought before said judge for examination for the offense charged in the information. The objection is that the reception in evidence of such statement or confession was in violation of the right secured to him by sec. 7, art. I, of the constitution, to meet the witnesses against him face to face. This assignment of error wholly fails, for the reason that the bill of exceptions, which is certified to contain all the evidence given upon the trial, does not contain the statement or confession referred to. The court has no means, therefore, of judging whether its reception in evidence was error prejudicial to the defendant *Grimshaw*.

For these reasons the judgment against the defendant *Grimshaw* must be affirmed.

The defendant *Sweet* sued out his separate writ of error, and, upon the return to the writ, made and assigned as error the same objections to the validity of the complaint and warrant as were made in the case of *Grimshaw*. From what has been said, it will be seen that this point needs no special attention.

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The second error assigned is that the court erred in receiving in evidence, upon the trial of said *Sweet*, the statements alleged to have been made before the municipal judge by *Grimshaw* and *Sweet* at the time of their arrest, as taken down in shorthand, and afterwards transcribed into longhand in the *Sweet* case by the reporter. Objection was made on the same ground as in the case of *Grimshaw*, and, further, that erasures or changes had been made in the transcript of the minutes written out by the reporter.

By the separate bill of exceptions returned to the writ of error taken by said *Sweet*, it appears that he made quite a lengthy statement before the municipal judge at the time of his arrest, in which, after the warrant was read to him and on being asked if he wanted an examination, he responded: "No judge, I am guilty of it. I am willing to own it. We went in and killed twelve chickens," etc.; and gave the circumstances in detail, stating that *Grimshaw* was with him, and that there were three of them, but denied knowing who the other was, and insisted that he had not been induced by any promise of an officer to make said statement or confession. After the information had been filed the defendant pleaded guilty. Subsequently counsel appeared in his behalf, and the examination was held open, and he was allowed to plead not guilty.

At the trial it appeared that the alleged erasure or change made in the transcript of the minutes of the reporter was trifling and immaterial.

Upon the trial the defendant *Sweet* testified as a witness in his own behalf, and gave a detailed statement of the particulars of the offense charged in the information, in substance: That they arrived alongside of the chicken house,—himself, *Grimshaw*, and Pooler. That the door was open quite a way,—about three quarters open. That they left the horses with Pooler, and he turned them around and took them up the road, "and we went in and got two apiece,

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and we came out, and I says, 'Well, we will get four apiece; that will be enough,—four for me and four for him.' I says, 'They will spoil on us;' and he says, 'No; we can eat them.' I put them in a bag,—ten or twelve in this bag. While we were in there we didn't see anybody come out. I saw somebody on the doorsteps, and I says, 'Leave the chickens there,' and I left the chickens there, and went up the road. The team was up there and Pooler, and we came back and got the chickens again. Then we thought we would leave them there, and wouldn't take them, and we walked down towards the road. We didn't know whether we dared drive past the house or not, and, if there wasn't anybody out there, we was going to drive by the house, and go to Waukesha this way. When we got down there, there was a couple of men there with a lantern, and we started to run up towards the team. They followed me up there. I came down the railroad track, and came to town. I was arrested at Darien." That when the paper was read to him in court he thought it was for stealing the chickens,—petit larceny,—and it was that he said he was guilty of. That he remembered he objected when the word breaking was used. "I said I didn't want to plead guilty to that, because there was no breaking done. I said something there about this third man,—that I didn't know him. It was because he was a married man, and I didn't have no place just then to stop,—nothing to look after,—so I thought I would plead guilty to it, and leave him out of it." He described the situation and location of the barn and chicken house with reference to the road. In brief, his testimony on the trial, taken in connection with his statement before the municipal judge upon his arrest, which extended over several pages, showed clearly, and beyond any dispute, his guilt of the offense charged against him and of which he was convicted by the jury. His present counsel attended the trial and participated in his examination as a witness, which fully corroborated his con-

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fession of guilt before the examining magistrate. The statement made by *Grimshaw* before the municipal judge on his preliminary examination was received in evidence at the trial only as against the defendant *Grimshaw*, and not as against said defendant *Sweet*, as his bill of exceptions clearly shows. In view of these facts, it is impossible to say that any material error intervened to the prejudice of the defendant *Sweet*. The presumption of innocence that ordinarily obtains in the case of a person charged with crime was clearly and entirely overcome by his confession before the municipal judge, and sustained and fully corroborated by his testimony thus given as a witness upon his trial in his own behalf. For these reasons the case of *Pooler v. State*, 97 Wis. 627, is not applicable.

The judgment against the defendant *Sweet* must therefore be affirmed.

By the Court.— The judgment in each case is affirmed.

BOHLMANN, Plaintiff in error, vs. THE STATE, Defendant in error.

February 14 — March 1, 1898.

Rape: Resistance: Evidence.

In a prosecution for rape committed upon a girl who, although but fifteen years of age, weighed 125 pounds and was well developed and accustomed to all kinds of work, by a man whose acquaintance she had made that night at a country dance and who was accompanying her to the place where she worked, the circumstances established by the evidence, taking the testimony of the girl as true, are *held* so inconsistent with that resistance to the best of her ability and accomplishment of the outrage against her will, necessary to make out the crime, that the jury were not warranted in saying that guilt was established beyond a reasonable doubt.

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Bohlmann vs. The State.

ERROR to review a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

The plaintiff in error, *Otto Bohlmann*, was convicted of the crime of rape. The circumstances of the offense, according to the evidence of the prosecuting witness, were substantially as follows: Alvina Berg, a servant girl in the family of one Pugh, and a girl friend by the name of Dora Haubeck, about 12 o'clock at night, started to go home from a country dance. *Bohlmann*, a man about twenty-seven years of age, who had become acquainted with the girls during the evening, without invitation or protest from them, started to accompany them home. The three went along a highway some distance, and then across the fields to the house of Dora, on another highway. *Bohlmann* and Alvina walked together, arm in arm, most of the way, and some of the way each with an arm around the other. After the home of Dora was reached, she bade the others good night, and they proceeded on the highway towards the home of Pugh, which was about half a mile away. After going a short distance *Bohlmann* kissed Alvina, and she told him she did not want his kisses, and pushed him away a little. He then threw her down and she screamed "Dear, dear!" He put his hand over her mouth and she tore off his necktie, and got away from him, and walked off fast. He followed, and after going a short distance, and near the house of one Lewis, caught up with her, and the two then walked along together till nearly to Pugh's house. *Bohlmann* then asked Alvina to go out on the side of the road to a grass plat by the road fence. She refused and went the other way. He then took hold of her and pulled her along over near the fence to the grass, then put his arm around and kissed her. She made no outcry or physical resistance to him in any way at that instant. He then threw her down on the grass, and lifted up her clothes, and unbuttoned the clothing nearest her person. Though her hands were free all the time,

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she made no outcry, and no resistance at all, except that she kicked with her feet. She said she struggled all she could, but, when pressed to say what she did by way of struggling, said she kicked with her feet; that she was afraid he would kill her; that he said if she would not keep still she would know what he would do to her; that she asked him what he would do and he made no answer. The outrage there took place, no resistance being made other than as detailed. Her underclothes were not torn in any way and there were no marks of violence upon her person or upon his. She did not resist *Bohlmann* by the use of her hands at all, or by the making of any outcry, or in any manner except as before stated. She was a large, strong girl, fifteen years of age, weighed 125 pounds, and was accustomed to work in and out of doors. After the alleged offense was committed the two got to their feet and the girl went on a distance of about a block to Pugh's, and *Bohlmann* turned back. The corroborating evidence is to the effect that the girl's clothes were soiled with dirt, and there were some spots on her underclothing, and the next day she complained to her mother of the treatment she had received.

R. B. Kirkland, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *C. E. Whelan*, second assistant attorney general.

MARSHALL, J. It is an essential element of the crime of rape that the outrage be accomplished by force and against the will of the female. If she consents at all, however reluctantly or tardily, without reference to the resistance that precedes it, that operates in the eye of the law to reduce the offense to fornication or adultery, according to circumstances. The ingredient of the crime that gives to it its most heinous character, is that violation of the will by which the unlawful act is accomplished, not only in spite of the female's

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power of resistance, exerted to her utmost ability under the circumstances, but without her consent. The power of resistance need not necessarily be overcome by superior physical force; if overcome by fraud or fear of serious personal injury, or if physical resistance becomes so useless as to warrant it ceasing upon that ground, there being no consent or submission in the sense of mental operation, the essential of the accomplishment of the act by force and against the will of the outraged party is fully satisfied. The law as thus laid down is too well understood and has been too frequently applied in this court to require discussion or call for any citation of authority. *Whittaker v. State*, 50 Wis. 518.

In the light of the foregoing it is said for the plaintiff in error that the evidence was not sufficient to justify the verdict of the jury finding him guilty of the crime of rape, and, as we view the case on the record, that presents the only question necessary for consideration.

The age of the girl was not such, considering the fact that in all but years she appears to have been a fully developed woman, as to warrant any very strong inferences in favor of the prosecution because of tender years.

She admitted that *Bohlmann* was a stranger to her, yet, though she had a girl friend for company, she voluntarily walked with him most of the way after leaving the dance, to the place where the alleged outrage was committed; that they walked arm in arm part of the time, and part of the time each with an arm around the other. After Dora, the girl friend, arrived at her home, Alvina proceeded with *Bohlmann*, and notwithstanding the fact that he threw her down after going but a short distance and acted in a way to indicate very clearly his design, all of which she says she understood, she made no very serious efforts to escape from the danger, though she demonstrated her ability to do so, and there was a neighbor's house near by to which she could readily have resorted. Taking her evidence as true, she was

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quite a match for *Bohlmann* at the first encounter, for she got away from him without injury, and proceeded toward her home. After she so escaped she passed near the neighbor's house and on to the scene of the second encounter, without even making an effort to resort to such house for safety, or to raise any alarm because of her danger. When the parties arrived within a distance of about a block from the house of Alvina's employer, the request was made that she go out on the grass plat near the road side fence. It does not appear that she refused other than by stepping back and compelling him to pull her, as she said, along toward the desired spot. She made no outcry; she did not use even a word of protest. In reaching the grass plat it was necessary to pass down into a ditch and up a bank, yet that appears to have been all accomplished without delay or difficulty. She testified that at that time she knew what he intended; that she stepped back but did not say anything; that he took hold of her and pulled her. He made no threats or said anything to put her in fear of personal injury other than that to be apprehended from such intended purpose.

During all the time till the grass plat was reached, and she was thrown upon the ground, and her clothes near her person removed, she exhibited none of those symptoms of alarm, or intense mental anguish, or physical resistance that would be reasonably expected of a woman under such circumstances in order to protect herself from a most grievous impending outrage. Up to the time she was on the ground, her clothes raised, and those near her person removed, though her hands were loose and nothing had yet been said to intimidate her, she does not appear to have done anything or said anything worth mentioning by way of protest or resistance, other than she kicked with her feet. She says the reason why she did not resist was, she was afraid *Bohlmann* would kill her, but it does not appear that he made any

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threat, or said anything to put her in fear of personal injury till his act had proceeded well on to its accomplishment; then he used the words, "If you do not keep still you will know what I will do to you." From first to last there does not appear to have been any resistance worthy of mention as such. There was no mark of violence upon Alvina's person, her underclothing was not torn, and after the encounter was over she proceeded on her way a few steps to the residence of her employer, and there retired for the balance of the night without making known the injury done to her, yet it was so recent that, upon the theory that it was rape, she had had no time to recover from the effect of the terrible outrage upon her mind. Applying that reason and common sense which men of mature years ordinarily possess to the circumstances as above related, one is almost persuaded to the idea that the rule that a person cannot be properly convicted of crime unless the facts constituting guilt are established by evidence beyond a reasonable doubt was displaced by the jury in this case, notwithstanding very full instructions by the learned trial judge on the subject, by the theory that there should be a conviction unless innocence were established beyond a reasonable doubt. All the reasonable inferences from the circumstances established by the evidence, taking the testimony of the girl as true, are rather against the theory that she resisted to the extent of her power so to do, and against the theory that she made any resistance at all, worthy to be called such.

Further discussion of the evidence will serve no valuable purpose. Failure of the girl to protest against going out of the road upon the grass plat, under the circumstances, other than by stepping back, and to offer any resistance other than such as was easily overcome, so that she walked to the desired place, and failure to use her hands to prevent, or voice to protest against, the arrangement of her clothing for the intended purpose, and failure to exhibit any of those symp-

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toms of intense mental anguish and alarm naturally to be expected of a woman when in imminent danger of having committed upon her that greatest of outrages that can be perpetrated upon one of her sex, if not strongly indicative of consent with some measure of reluctance, certainly are so inconsistent with that resistance to the best of her ability and accomplishment of the outrage against her will, necessary to make out the crime of rape, that the jury were not warranted in saying that guilt was established by the evidence beyond a reasonable doubt.

By the Court.— The judgment of the circuit court is reversed, the cause remanded for a new trial, the warden of the state prison directed to deliver the accused, *Otto Bohlmann*, into the custody of the sheriff of Jefferson county, and he is directed to keep him subject to further proceedings according to law.

CRAWFORD, Plaintiff in error, vs. THE STATE, Defendant in error.

March 5, 1898.

Adultery: Husband and wife: Witnesses: Competency.

A wife is not a competent witness against her husband in a prosecution for adultery

ERROR to review a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Reversed.*

For the plaintiff in error there was a brief by *D. T. Phelan*, attorney, and *Simon Gillen*, of counsel:

[No brief on file for the defendant in error.]

The following opinion was filed March 22, 1898:

CASSODAY, C. J. The plaintiff in error was tried and convicted of the crime of adultery, and sentenced to imprison-

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ment in the state prison for the term of two years, and to reverse that judgment he sues out this writ of error.

Upon the trial his wife was admitted as a witness in behalf of the state, and allowed to testify. This was manifest error. It is well settled that "neither husband nor wife can be a witness at common law for or against the other in prosecutions" for adultery. 2 Whart. Crim. Law (10th ed.), § 1736; 1 Greenl. Ev. § 334; 3 Jones, Ev. § 751; *Mills v. U. S.* 1 Pin. 73; *Schoeffler v. State*, 3 Wis. 823, 844. "With certain exceptions, it was, at common law, against public policy to allow the wife to be a witness for or against her husband in any action, civil or criminal, to which she was not a party." *Smith v. Merrill*, 75 Wis. 462. The case at bar does not come within any exception. Nor is there any statute in this state making the wife a competent witness against the husband in such a case. Certainly sec. 4072, R. S. 1878, does not. See *Farrell v. Ledwell*, 21 Wis. 182; *Carney v. Gleissner*, 58 Wis. 674; *Selden v. State*, 74 Wis. 271; *Smith v. Merrill*, 75 Wis. 461; *Horner v. Yance*, 93 Wis. 352; *Lanctot v. State, ante*, p. 136.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

COOK and another, Respondents, vs. THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

February 9 — March 22, 1898.

(1) *Railroads: Fire set by locomotive: Junction with other fire: Proximate cause.* (2) *Failure to fence: Killing of animals on track.* (3) *Appeal: Printing: Costs.*

1. A fire started by defendant's negligence, after spreading one mile and a quarter to the northeast, near plaintiffs' property, met a fire having no responsible origin, coming from the northwest. After

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the union, fire swept on from the northwest to and into plaintiffs' property, causing its destruction. Either fire, if the other had not existed, would have reached the property and caused its destruction at the same time. *Held:*

(1) That the rule of liability in case of joint wrongdoers does not apply.

(2) That the independent fire from the northwest became a superseding cause, so that the destruction of the property could not, with reasonable certainty, be attributed in whole or in part to the fire having a responsible origin; that the chain of responsible causation was so broken by the fire from the northwest that the negligent fire, if it reached the property at all, was a remote and not the proximate cause of the loss.

2. After the fire swept everything of a combustible character clean, on both sides of defendant's right of way, plaintiffs' horses, that were running at large, went upon the railway track and were killed by a passing train without negligence on the part of the train men. The right of way had never been fenced as required by law. *Held:*

(1) That the rule of absolute liability, under the statute requiring railway companies to fence their tracks, applies only where the loss is produced, in whole or in part, by reason of the failure to fence.

(2) That in the circumstances stated the chain of causation reaching from the failure to fence was broken by the fire that would unquestionably have destroyed the fence if it had existed, so that the failure to fence cannot be said to have contributed to the entry of the horses upon the railway track.

The rules require the printing of a case by the appellant, and one brief on each side, on appeal to this court; they also permit a reply on each side. Costs as of right, for printing, are limited to such as is reasonably necessary or permitted under the rules.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

The complaint sets forth four causes of action at law:

(1) For compensation for the destruction by a fire on the 20th day of May, 1893, of a lumber camp, several buildings, the camp equipage for a large number of men, some lumber, and a quantity of posts, poles, ties, slabs, and other

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personal property at Corliss, Wis., of the alleged value of $58,820.79, upon the ground that a fire was started at a point on defendant's right of way about a mile and a quarter southwest of such property by the escape of cinders from one of defendant's engines to dry, combustible material negligently left on its right of way, which fire spread to such property and did the mischief complained of.

(2) To recover for the loss of two horses of the value of $500, killed May 20, 1893, by one of defendant's engines on its right of way, where such horses strayed because defendant failed to fence such right of way as required by law.

(3) To recover compensation for the loss of one horse of the alleged value of $225, killed by one of defendant's engines on its right of way, on the 13th day of March, 1892, where it strayed because defendant failed to fence such right of way as required by law.

(4) To recover compensation for the loss of a cow of the alleged value of $50, killed the 27th day of August, 1892, by one of defendant's engines on its right of way, where it strayed because defendant failed to fence such right of way as required by law.

The judgment prayed for was $60,825, with costs.

The answer put in issue the origin of the fire alleged to have destroyed the property mentioned in the first cause of action, the value of such property, and also all other disputed matters covered by the verdict, hereafter mentioned. On the trial facts were admitted entitling plaintiff to recover on the third and fourth causes of action, and there was no controversy upon the evidence but that the horses mentioned in the second cause of action were killed by one of defendant's engines as alleged, and that defendant failed to comply with the laws of this state in respect to fencing its right of way. The circumstances leading up to the entry of the horses upon the right of way were that, because of danger of the destruction of the stables where the horses

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were located on the 20th day of May, 1893, they were turned loose and driven towards a place of safety away from the defendant's track; that later in the day and after the fire had swept over the country up to the right of way, the horses returned to the vicinity of their stables and in doing so went upon the defendant's track and were killed by a passing engine, which was going very slowly on account of existing conditions in regard to smoke and recent burning.

As to the origin of the fire which destroyed the plaintiff's property, there was evidence tending to show that, about 9 o'clock on the morning of the 20th of May, 1893, a fire was started in some way by a passing engine, in combustible material on the defendant's right of way near Boom Hill, a mile and a quarter southwest of Corliss, where plaintiffs' property was located; that the wind at that time was blowing from the south and southwest; that the fire spread for a time in a northerly and northeasterly direction, carried by the wind blowing from the south and southwest; that towards noon the wind changed to the west; that between 12 and 1 o'clock the wind changed so as to blow from a northwesterly direction, and increased to a gale; that at the time the fire was spreading north from Boom Hill as stated there was a fire some distance northwest of plaintiffs' property, which, as the wind changed to the west and northwest and increased to a gale, was carried southeasterly and easterly to the vicinity of such property, so as to meet the line of fire from the southwest before that reached said property; thereafter and about 1 o'clock, carried by the strong gale of wind aforesaid, fire swept down from the west and northwest, to and into said property, and caused the destruction complained of.

The court instructed the jury in substance, among other things, that if they found that the fire set by the defendant's engine was attributable to its negligence, and was the sole cause of the destruction of plaintiffs' property, they

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were entitled to recover the entire damage they thereby sustained; that if the jury found that the negligence of the defendant contributed to produce the fire which caused the damage, and that there were other fires which also contributed to the loss, and they could figure out what amount of such damage resulted from the fire originated from such negligence, they might do so.

The jury rendered a special verdict in substance as follows:

(1) The defendant's engine No. 403 set fire on its right of way at a place called Boom Hill, on the morning of May 20, 1893.

(2) The fire spread to plaintiffs' cedar yard and camp at Corliss, and set fire to the same.

(3) There was another fire which came from the northwest at the same time and was driven into the plaintiffs' yard and camps and set fire to the same.

(4) The fire which came from the northwest united with the fire set by defendant's engine before reaching the cedar yard.

(5) Defendant's engine was properly constructed and equipped to prevent the escape of sparks and cinders, and it was in good condition and properly managed.

(6) Defendant was guilty of negligence on account of the condition of its right of way where the fire started, which caused, or contributed to, the starting of the fire.

(7) There was a want of ordinary care on the part of the defendant, which caused the fire to start on its right of way.

(8) Such want of ordinary care consisted in not keeping the right of way reasonably clear of combustible material.

(9) Plaintiffs' damage, caused by the fire started by defendant's negligence, we assess at fifty per cent. of their claim, less the insurance, amounting to $26,182.93.

Defendant's counsel made several motions to correct the verdict and for judgment thereon; also a motion for judg-

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ment on the verdict and the evidence, dismissing the complaint as to the first cause of action, also as to the second cause of action; also a motion, in effect, for such judgment in its favor as the court might decide it was entitled to on the verdict; also for an order setting aside the verdict as contrary to the evidence and for other reasons, and granting a new trial. All of such motions were denied and due exceptions to the denials taken. Plaintiffs' counsel moved on the verdict for such judgment as the court might decide they were entitled to. On such motion the court construed the verdict of the jury as apportioning the fire loss equally between the fire originated by the defendant and the fire that came from the northwest, which was of unknown origin, upon the theory that, as the fires united and entered the yard together, only half of the loss was attributable to the negligence of the defendant. As a matter of law the court held that as defendant's negligence in starting the Boom Hill fire contributed to produce the loss, it was responsible for the entire damage, measured by the reasonable value of the property destroyed, and legal interest thereon from the date of the fire. Thereupon judgment was ordered for the entire value of the property destroyed, less the insurance received, such value on the verdict, under the charge, being computed by the court at $55,865.87, and the insurance $1,750. Judgment was also ordered for the value of the two horses mentioned in the second cause of action as found by the jury, with interest from the time they were killed, and for the undisputed value of the horse and cow mentioned in the third and fourth causes of action, with interest from the time they were killed, amounting in all to the sum of $59,584.36. Due exception was taken to the order. Judgment was entered in accordance with such order, from which this appeal was taken.

For the appellant there were briefs by *Alfred H. Bright*, attorney, and *Greene, Vroman & Fairchild*, of counsel, a

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brief signed by *H. O. Fairchild*, and a brief by *Geo. G. Greene;* and the cause was argued orally by *Mr. Bright* and *Mr. Fairchild.* They argued, among other things, that while each of several concurring wrongs, in legal effect, may become identified with every other so that all are considered one wrong because all are wrong, and so that the result is, in the law, considered due to one tortious cause although it is composed of several tortious acts, it is absurd to apply the same rule or the same reason to the concurrence of a wrongful act with innocent causes, ranging from the sudden illness or fright of a horse to the irresistible forces of nature, or to the act of God. The true doctrine in such cases is that mere contribution is not the foundation for the legal action; but the negligence of the defendant must be present as a necessary condition of the loss or injury. It must be that cause without which the injury would not have resulted. *Hooksett v. Amoskeag Mfg. Co.* 44 N. H. 105; *Lord Bailiffs v. Trinity House Corp.* L. R. 5 Exch. 205; 7 id. 247; 2 Thomp. Neg. 1063; *Salisbury v. Herschenroder*, 106 Mass. 458; *Dickinson v. Boyle*, 17 Pick. 78; *Woodward v. Aborn*, 35 Me. 271; *Pittsburgh v. Grier*, 22 Pa. St. 54; *Scott v. Hunter*, 46 id. 192. Whenever an act due to negligence concurs with other causes which are innocent or not due to negligence, and a loss or an injury results, the defendant may be held liable notwithstanding the concurrence of such other causes, *provided* the facts would warrant a jury in finding that the loss or injury would not have resulted but for the negligent act of the defendant. 4 Am. & Eng. Ency. of Law, 41; 16 id. 441; *Dreher v. Fitchburg*, 22 Wis. 675; *Houfe v. Fulton*, 29 id. 296; *Ring v. Cohoes*, 77 N. Y. 83, and cases cited; *Ayres v. Hammondsport*, 130 id. 665; *Gage v. P., O. & N. R. Co.* 105 Mich. 335; *Ouverson v. Grafton*, 5 N. Dak. 281; *Campbell v. Stillwater*, 32 Minn. 308; *Baltimore & O. R. Co. v. Sulphur Springs Independent Sch. Dist.* 96 Pa. St. 65, 2 Am. & Eng. R. Cas. 166; *Perley v. Eastern R. Co.* 98 Mass. 414; *Ilfrey*

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v. S. & E. T. R. Co. 76 Tex. 63; *Oliver v. La Valle*, 36 Wis. 592; *Stacy v. Knickerbocker Ice Co.* 84 id. 614; *Postal Tel. Co. v. Zopfi*, 93 Tenn. 369; *Board of Comm'rs of Parke Co. v. Sappenfield*, 6 Ind. App. 577; *Union St. R. Co. v. Stone*, 54 Kan. 83; *Sowles v. Moore*, 65 Vt. 322; *Joliet v. Verley*, 35 Ill. 58; *Palmer v. Andover*, 2 Cush. 600; *Bloomington v. Bay*, 42 Ill. 503, 510; *Lacon v. Page*, 48 id. 499; *Carterville v. Cook*, 129 id. 152, 155; *Briggs v. Minneapolis St. R. Co.* 52 Minn. 36; *Taylor v. Yonkers*, 105 N. Y. 202; *Kaveny v. Troy*, 108 id. 571. It is not clear that the jury has not found that the destruction of plaintiffs' property would not have occurred but for the fire on the Boom Hill, but also that the evidence is conclusive the other way. There was a superior, predominating cause which was innocent, by which the destruction was then and there inevitable without regard to the passing engine or the condition of the right of way, and this was the proximate cause and the defendant was not liable. *Insurance Co. v. Transp. Co.* 12 Wall. 197; Shearm. & Redf. Neg. (4th ed.), § 39; and the cases cited above.

For the respondents there was a brief by *Webster & Classon*, and oral argument by *W. H. Webster*. They contended, *inter alia*, that having found an efficient producing cause for the destruction of the yard, set in motion by the defendant and continued in unbroken progress until the injury was accomplished, it was enough to charge the defendant with liability for the loss. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475; *Kalckhoff v. Zoehrlaut*, 43 Wis. 374; *Hepler v. State*, 58 id. 46; *Murphy v. Martin*, id. 276; *Stewart v. Ripon*, 38 id. 584; *Chicago & E. R. Co. v. Luddington*, 10 Ind. App. 636; *Chicago & E. R. Co. v. Bailey* (Ind. App.), 46 N. E. Rep. 688. If the verdict establishes that the northwest fire and the fire due to defendant's negligence joined, entered, and together destroyed the plaintiffs' yard and camps, defendant's liability is the same as though the fire due to its negligence was the sole cause of the destruction

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of the property, whether the northwest fire was tortious or not, the reason of the rule that makes the tortfeasor, in such a case, liable as though his wrongful act caused the entire damage being that the damage cannot be apportioned and the innocent loser shall not, because he cannot apportion them, be deprived of his remedy and the wrongdoer go free. *Slater v. Mersereau*, 64 N. Y. 138; *Westfield G. & M. Co. v. Abernathy*, 8 Ind. App. 73; *Boston & A. R. Co. v. Shanly*, 107 Mass. 568; *Churchill v. Holt*, 131 id. 67, 41 Am. Rep. 191; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727, 7 Allen, 26; *Matthews v. D., L. & W. R. Co.* 56 N. J. Law, 34, 22 L. R. A. 261; *Ellis v. Howard*, 17 Vt. 330; *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185; *Valparaiso v. Moffitt*, id. 250; *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 10 U. S. App. 209, 51 Fed. Rep. 649; *The Atlas*, 93 U. S. 302; *Sturgis v. Boyer*, 24 How. 122; *The Beaconsfield*, 158 U. S. 303; *Folsom v. Apple River L. D. Co.* 41 Wis. 602; *State ex rel. Reynolds v. Babcock*, 42 id. 138; *Washington & G. R. Co. v. Hickey*, 166 U. S. 521; Bishop, Non-Contract Law, §§ 39, 518; 16 Am. & Eng. Ency. of Law, 440; *Chicago, R. I. & P. R. Co. v. Sutton*, 27 U. S. App. 310, 63 Fed. Rep. 394; *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 375, 18 L. R. A. 154; *Dreher v. Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91, and cases cited; *Jones v. United States*, 48 Wis. 385; *Arimond v. Green Bay & M. Canal Co.* 35 id. 41. No wrongdoer ought to be allowed to apportion his own wrong; and as a loss has actually happened while his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss. To entitle such party to exemption, he must show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done. *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 375, 18 L. R. A. 154; Cooley, Torts, 76, and note on p. 78; *Davis v. Garrett*, 6 Bing. 716; *Baltimore & P. R. Co. v. Reaney*, 42 Md.

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117; *Beauchamp v. Saginaw Mining Co.* 50 Mich. 172. The proposition that the plaintiffs, injured by the two concurring fires, cannot have a recovery against the tortious author of one of them, where he fails to show that the destruction of the property by the independent cause found by the jury, the northwest fire, was not, or where the defendant shows it was, inevitable if the fire had never been started on the right of way at all, is clearly unsound. *Boston & A. R. Co. v. Shanly*, 107 Mass. 568; *Churchill v. Holt*, 131 Mass. 67, 41 Am. Rep. 191; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727, 7 Allen, 26; *Ellis v. Howard*, 17 Vt. 330; *Westfield G. & M. Co. v. Abernathy*, 8 Ind. App. 73; *Slater v. Mersereau*, 64 N. Y. 138. Defendant's contention is directly opposed by the doctrine that determines the liability of joint tortfeasors, acting independently. *McClellan v. St. P., M. & M. R. Co.* 58 Minn. 104; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; *Stetler v. C. & N. W. R. Co.* 46 Wis. 497, 49 id. 609; *Haley v. Jump River Lumber Co.* 81 id. 412; *Atkinson v. Goodrich Transp. Co.* 60 id. 141, 50 Am. Rep. 352; *Folsom v. Apple River L. D. Co.* 41 Wis. 602; and *State ex rel. Reynolds v. Babcock*, 42 id. 138. Neither the main track or spur track at Corliss ever having been fenced, the liability of defendant for killing the horses May 20, 1893, was absolute. S. & B. Ann. Stats. sec. 1810; *Quackenbush v. W. & M. R. Co.* 62 Wis. 411, 71 id. 473; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1.

MARSHALL, J. The foregoing brief statement is believed to present clearly the only questions necessary to be considered in determining this appeal. Numerous questions were suggested and errors assigned and exhaustively and ably discussed in the numerous briefs of eminent counsel who represent the parties in this court, most of which questions and alleged errors, in what is deemed to be an orderly consideration of the cause, are not necessarily reached in

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arriving at a final conclusion as to the rights of the parties. That will appear from what follows, and is the reason why such questions have not been considered or decided. No further proceedings in this case will involve them, and they are not of such a character that a decision of them would be important to trial courts in the future. This is said as to the greater part of the field covered by the case and briefs of counsel, not by way of criticism, for it is reasonable and commendable that, at least where so large a sum of money as the judgment here calls for is involved, all questions deemed by counsel in any way liable to affect the final result in any view of the case be suggested to the court; yet, where no trial follows the result here, the questions necessary to a determination of the appeal are all that it is profitable to discuss, unless others are of special importance as future guides.

The controlling question on the record, as we view it, is, What was the proper judgment on the first cause of action according to the undisputed facts and the facts found by the jury? The respondents stand on the findings of the jury as verities, and must prevail, if at all, on the case as thus determined. On the various motions made by the parties the court was called upon, if the verdict stood the test of the motion to set it aside as contrary to the evidence and for other reasons, to order judgment for appellant or respondents, according to the determination reached on the questions of law which they presented. Such questions were determined in respondents' favor. The principles they involved will clearly appear to be of far-reaching importance by a brief reference to the facts.

The jury found that the southwest fire, alleged to have been caused by defendant's negligence, and to have originated about one mile and a quarter southwest of the property destroyed, did not reach such property so as to affect it as an independent agency; that another fire came from the

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northwest, and so united with the other that the identity of both as independent agencies was lost before any fire reached such property; that when the northwest fire reached the line of the southwest fire, so there was in fact but one fire, it swept on into the yard, and set plaintiffs' property on fire and destroyed it. While the jury found that both fires caused the burning, as they said that but one fire entered the yard and that swept into it from the northwest, the direction from which the independent fire of unknown origin came, it is hard to perceive how the fact can be that the southwest fire, as an efficient agent, ever reached the scene of the destruction. But, looking at the verdict in the most favorable view for the respondents, and giving it the most favorable construction it will reasonably bear, it is to the effect that the damage was done solely by one fire; that such fire was made up of two independent fires which united before the property was reached, one for which defendant was responsible, and the other having no known responsible origin, so that if the responsible agent had not existed at all the loss would have been the same in all respects, as to time, manner, and extent. We are strongly persuaded from the evidence that the finding of the jury that the southwest fire, as an efficient agent, reached the plaintiffs' property, either by union with the northwest fire or otherwise, is contrary to undisputed facts and all reasonable probabilities; but that is one of the questions not necessary to decide, if, taking the verdict as it stands, defendant is not liable.

That we correctly construe the verdict of the jury cannot be reasonably questioned. The trial judge, in a very elaborate opinion, delivered in disposing of the motions for judgment, gave it the same construction. He said: "Each fire reached the yard only as part of one common fire, and either in the absence of the other would have reached and fired the yard the same as the joint fire did. In that sense both reached the yard at the same time, although they united

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some distance away from it. Under the law governing the case it is immaterial how far away they united." And again: "We reach the conclusion that neither was the proximate cause of the injury, because the event would have occurred without either cause,— the other cause existed,— each was concededly a cause sufficient to produce the injury. The injury was produced by the concurrent action of both, but neither was the proximate cause, because the other, without it, would have produced the same result." The logic of the learned circuit judge, as to the proximate cause, would hardly bear the test of careful analysis. It may be, to take his language literally would not convey the real meaning intended. Where two causes concur in producing a certain result, either of which would produce the same result regardless of the other, it is not an accurate statement of the situation to say that neither is the proximate cause of such result, using the term as we apprehend the learned judge did, as descriptive of the antecedent or producing cause, and not in the strict legal sense of a cause referable to human agency on a line of responsible causation. In the mere physical sense of producing antecedent, it is more proper to say that, in the circumstances suggested, neither fire was the sole proximate cause of the loss.

From what has preceded it is apparent that the legal question presented to the trial court and decided in plaintiffs' favor, in granting their motion for judgment and denying that of the defendant, is the following: Where two independent efficient causes unite and produce an injury to another, one of which is traceable to a responsible person whose negligence set it in motion under such circumstances that he is chargeable with knowledge that it might cause an injury to another as a natural and probable result of his conduct, and the other cause is not traceable to any known responsible agent, each of which causes, however, without the concurrence of the other would produce the same injury,

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that is, so that the injury would happen at the same time and to the same extent regardless of the responsible agency, does a cause of action against such agency accrue to the injured person for his loss? It is believed that the solution of that question is governed by principles as old as the common law,— principles so long and firmly established, and universally recognized by all text writers and courts, that were it not for the learned discussion of the subject by the trial court, leading up to the conclusion which eventuated in the judgment appealed from, and the later learned discussion by counsel in this court to support the conclusion thus reached, the decision here would be supported by a mere statement of the law without extended discussion or citation of authorities; but such circumstances seem to furnish excuse, at least, for a somewhat different course.

It seems to have been conceded on the trial below, at one stage of the proceedings, that unless the alleged negligent fire was the sole cause of the loss complained of, there could be no recovery therefor. Later, in the submission of the case to the jury, it appears to have been uncertain in the judicial mind, whether, if the defendant was liable at all, the liability extended to the entire loss, or only to a portion of it, on the theory that there might be an apportionment of the loss between the concurring causes. But it was finally determined that the person charged, known to have negligently originated one of the causes, was, as a matter of law, liable for the entire loss, though it would have happened just the same from the other efficient cause of unknown origin. To support that theory numerous cases are cited to the effect that when two or more concurring causes produce a loss, each having a responsible source, there is a joint and several liability for the entire loss. That is a doctrine too familiar to require more than to be stated. When the facts are such as to invoke its application, it extends to where each of the concurring causes contributes to produce

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the result and is necessary to it, and where each is sufficient of itself to produce the result and would, in the given case, have that effect regardless of the other, and whether the concurrence of the causes be intentional or accidental.

In *Haley v. Jump River Lumber Co.* 81 Wis. 412, a person, on one theory of the case, was injured by negligence of a co-employee in loading a car, concurring with negligence of the defendant in leaving an obstruction in dangerous proximity to the track. Under such circumstances the court said that each was liable for the injury. In the same line is *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, where negligence of a mill owner in allowing shavings and sawdust to accumulate between his mill and a dock, concurred with negligence of the defendant in allowing sparks to be emitted from the smokestack of its boat, whereby a fire was set which spread to plaintiff's property and destroyed it. The court held the defendant liable, and Mr. Justice TAYLOR, who wrote the opinion, cited in support of it, among numerous authorities, the elementary rule laid down in Wharton on Negligence at § 144, in substance as follows: The fact that one responsible person contributes, either before the interposition of another or concurrently with such interposition, in producing the damage, is no defense as to either. If A. negligently leaves certain articles in a particular place, and B. negligently meddles with them, supposing B.'s negligence to be made out and he is a responsible party under the limitation expressed, he cannot set up A.'s prior negligence as a defense. Another example is *Johnson v. N. W. Tel. Exch. Co.* 48 Minn. 433, where a weak telephone pole was negligently left in place by the company. For a limited time an adjoining lot-owner allowed the company to reinforce the ability of the pole to stand by guying it to his building with a wire. After a reasonable time had elapsed in which to replace the defective pole with a suitable one, the property owner cut the guy wire and the result was

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that the pole fell and injured the plaintiff. On one theory of the case the property owner and the telephone company were both negligent, and without the concurring negligence the injury would not have happened. Under these circumstances the court said that each was liable for the whole loss.

On another branch of the rule mentioned, as an example of numerous authorities that might be cited, is *Gould v. Schermer*, 101 Iowa, 582, where, on one theory of the case, defendant's negligence concurred with some other cause, not attributable to any responsible human agency, to produce the injury, and the court said, in effect, that the defendant's wrong, concurring with the other cause, and both operating proximately at the same time in producing the injury, makes the wrongdoer liable therefor. That was on the theory that the accident would not have occurred but for the negligent act.

On another branch of the rule stated may be cited *Slater v. Mersereau*, 64 N. Y. 138, where there were two efficient proximate causes, each traceable to the negligence of a responsible party, either of which would have caused the entire injury regardless of the existence of the other, and the court, by MILLER, J., said in substance: It is no defense for a person against whom negligence which causes damage is established, to prove that without fault on his part the same damage would have resulted from the negligent act of the other, but each is responsible for the entire damage.

Further citation of authority along this line is deemed unnecessary. It will be easily observed that they refer, first, to cases where there was a concurrence of responsible human agencies, both of which were essential to the result; second, to cases where there was a concurrence of responsible human agencies, either of which would have effected the result regardless of the other; third, to cases where there was a concurrence of a responsible human agency and some other cause, and the former was an efficient contributing cause

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and essential to the result. All of the numerous cases cited by respondents' counsel, and those cited by the learned circuit judge, fall within one or the other of the situations mentioned, as, for example, *McClellan v. St. P., M. & M. R. Co.* 58 Minn. 104, much relied on to support the judgment, where the recovery was solely on the ground that, though there was proof of two fires, the finding of the jury was that the fire negligently originated by defendant was the one that reached the plaintiffs' property and the sole cause of its destruction. In discussing an assignment of error on the charge given by the trial court, the judge who delivered the opinion said: "If two fires have been set, the origin of one or both of which can be traced to the negligence of a party or parties, either or both of the parties can be held responsible for the resulting damages, in case the fires mingle." That language was wholly unnecessary to a decision of the case, as no such situation was presented, and, unless read in the light of well-understood legal principles and the circumstances which were evidently in the judicial mind, it would be very liable to mislead. In the view that the judge was speaking of the existence and concurrence of two fires, both attributable to the negligence of responsible agencies, so as to bring the case within the rule of joint wrongdoers, the language ceases to have any significance in support of the theory upon which this judgment was rendered and must stand, if at all. That the rule of joint tortfeasors was what the court referred to, is plain from what was subsequently said by way of illustration, to the effect that, where the injury is the result of two concurrent causes, one party is not exempt from full liability *although another is equally culpable.* To say that the learned court intended to extend that rule to cases where the act of the wrongdoer concurs with some unknown cause not attributable to any responsible human agency, and causes damage, thereby rendering the legal consequences to the wrongdoer the same as in the case of joint

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wrongdoers, whether his act was essential to the result or not, would be a conclusion not warranted by a careful reading of the whole opinion, and inconsistent with the settled rule of law on the subject, recognized by that court and all others, as we shall see later.

What has been said above applies to *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; *Stone v. Dickinson*, 5 Allen, 29; *S. C.* 7 Allen, 26; *Stetler v. C. & N. W. R. Co.* 46 Wis. 497; and the numerous other cases cited by respondents. All are cases of joint tortfeasors, or cases where the injury would not have happened but for the negligence complained of. They do not touch the real question we are called upon to decide. What is the situation of the wrongdoer where the injury would have taken place, necessarily, from another cause, at the same time and to the same extent, regardless of his conduct? That is the question presented. The discussion thus far has proceeded on a line merely to clearly bring out and recognize the well-known principles of law for which respondents contend and which ruled the trial court, and show their inapplicability to the facts found by the jury.

The law of negligence is laid on reasonable lines the same as any other branch of jurisprudence. The theory upon which compensation goes to an injured person from another whose negligence proximately caused the injury, is not that of punishment for the wrong, but that, in justice to such person, compensation is due for the damages caused to him by such negligence, so far as the same can be reasonably ascertained. Where the wrong of one person concurs with that of another under such circumstances that the injury would not result without the concurrence, it is reasonable to hold each liable for the entire loss, because the same would not have occurred if the negligence of either were absent. Notwithstanding the concurrence of the two causes, each, in a sense, under such circumstances, is the proximate cause of the loss, because there is responsible human causation back

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of it, without which the injury would not have happened. Again, where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, it is reasonable to say that there is a joint and several liability, because, whether the concurrence be intentional, actual or constructive, each wrongdoer, in effect, adopts the conduct of his co-actor, and for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole. The whole loss must necessarily be considered and treated as an entirety. But where a cause set in motion by negligence reaches to the result complained of in a line of responsible causation, and another cause, having no responsible origin, reaches it at the same time, so that what then takes place would happen as the effect of either cause, entirely regardless of the other, then the consequence cannot be said, with any degree of certainty, to relate to negligence as its antecedent; requisite intelligent causation necessary to legal liability is wanting, leaving no ground, in reason or in law, for it to rest upon.

To further illustrate: If an injury accrues to a person from inability to control his team, where that is more than momentary, concurring with a defect in the highway, and the injury would not otherwise happen, the mere concurrence of negligence of the municipality responsible for the defect will not render the corporation liable, because the condition of the team is deemed to be the real producing cause. *Jackson v. Bellevieu*, 30 Wis. 250; *Houfe v. Fulton*, 29 Wis. 296; *Schillinger v. Verona*, 96 Wis. 456; *Loberg v. Amherst*, 87 Wis. 634; *McFarlane v. Sullivan*, 99 Wis. ——; *Scannal v. Cambridge*, 163 Mass. 91; *Babson v. Rockport*, 101 Mass. 93; *Palmer v. Andover*, 2 Cush. 600.

Applying the same doctrine in *Campbell v. Stillwater*, 32 Minn. 308, the court held that where several concurring acts

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or conditions of things, one of them a wrongful act or omission of some person, under such circumstances that such person might reasonably have anticipated such an injury as the natural and probable result of his act or omission, he is liable, provided the injury would not have occurred without it. The general rule, so recognized and applied by that court, was stated by the judge who wrote the opinion, thus: "In case of tort, the rule as to the proximate cause is, that where several acts or conditions of things produce an injury, if one is the wrongful act or omission of the defendant *and it would not have occurred without his act*, and he might reasonably have anticipated the result as a natural consequence of such act, that is the proximate cause of the result." That is quite inconsistent with the construction of the opinion of the same court in *McClellan v. St. P., M. & M. R. Co.* 58 Minn. 104, confidently pressed upon our attention, but accords with the construction which we have given to it and which was clearly what the court intended, though, as before indicated, language was used that might lead to a different conclusion unless viewed in the light of settled legal principles. It may safely be said that the rule stated in *Campbell v. Stillwater*, 32 Minn. 308, applies in all cases where negligence of a party concurs with some other cause not traceable to a responsible source. 16 Am. & Eng. Ency. of Law, 441, and notes; 2 Thomp. Neg. 1085; Shearm. & Redf. Neg. § 33; Whittaker's Smith, Neg. (2d Am. ed.), 44; *Ring v. Cohoes*, 77 N. Y. 83; *Ayres v. Hammondsport*, 130 N. Y. 665; *Ilfrey v. S. & E. T. R. Co.* 76 Tex. 63; *Union St. R. Co. v. Stone*, 54 Kan. 83; *Carterville v. Cook*, 129 Ill. 152.

The logical deduction from the foregoing is that where an injury accrues to a person, by the concurrence of two causes, one traceable to another person under such circumstances as to render him liable as a wrongdoer, and the other not traceable to any responsible origin, but of such efficient or superior force that it would produce the injury regardless of

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the responsible cause, there is no legal liability. No damage in such circumstances can be traced, with reasonable certainty, to wrongdoing as a producing cause. The one traceable to the wrongdoer is superseded by the other cause or condition, which takes the place of it and becomes, in a physical sense, the proximate antecedent of what follows.

From the foregoing the conclusion is easily reached that the defendant in this case is not liable for the fire loss from the facts found by the jury. Its negligence, even if operating up to about the instant the fire entered the plaintiffs' property, was there superseded by the independent northwest fire. Whether it can be said that after the two fires became one the element attributable to the defendant continued, though its identity was lost in the combination and it was superseded by the fire that swept down upon the property from the northwest, it cannot be said that the result which followed would not have occurred but for such responsible element. On the contrary it stands as a verity in the case that it would have occurred just the same, regardless of the negligent fire.

It is proper to say that the learned counsel for the plaintiffs tried the case and asked its submission to the jury with a very clear conception of the legal principles governing it, in perfect accord with the conclusion which we have reached. They did not seek or expect to recover upon any other theory than that the destruction of plaintiffs' property was caused by the southwest fire, and that it would not otherwise have occurred at that time. One of the counsel said, in substance, during a colloquy between him and the court, when the questions for submission to the jury were being settled: We must stand or fall on the theory that the southwest fire spread to plaintiffs' property and destroyed it, and that no fire came from the northwest and reached the property; that if the whole loss can as well be attributed to the northwest fire as to the southwest fire, no assessment of

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damages can be made against the defendant. The whole difficulty arose when, after the verdict was rendered, the doctrine of the liability of joint wrongdoers, or of a wrongdoer when his act, concurring with some other cause or condition having no responsible origin, produces an injury which would not otherwise occur, was applied to the verdict, unmindful, apparently, that such verdict did not present facts warranting such application, but on the contrary presented facts which brought the case within a different rule in the law of negligence.

There is left the claim for the two horses, killed on the day of the fire by straying upon the right of way and being run down by one of defendant's engines. It is not claimed that there was any negligence of the employees in charge of the train that killed the horses. The right of recovery is based solely upon the fact that defendant failed to perform its duty in respect to fencing the right of way. The statute on the subject (sec. 1810, R. S. 1878) requires railroad corporations to fence their tracks, and provides that until such duty is performed, every such corporation, and every railroad corporation owning any such road, shall be liable for all damage done to cattle, horses, or other domestic animals, *occasioned in any manner, in whole or in part, by the want of such fence.* If the horses, therefore, entered upon the right of way because of the failure of the defendant to comply with the statute, then the rule of absolute liability attached. *Quackenbush v. W. & M. R. Co.* 62 Wis. 411. There is no finding on the question of whether the entry of the horses on the right of way is attributable in whole or in part to the failure to fence it. It must be conceded that, had there been a fence, it would necessarily have been destroyed by the fire that occurred two or three hours before the horses were killed. The evidence all points that way. They were turned out of their stable and left to run at large to preserve them from the fire that destroyed substantially

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everything of a combustible character on both sides of the railway track in the vicinity of the place where they entered upon the right of way.

The statute is in derogation of the common law. It is a penal statute. The validity of it rests wholly upon the police powers of the government, and it should be construed with reasonable strictness so as not to go beyond its plain letter and spirit. That is a general rule of construction applicable to all statutes of its class. *Stone v. Lannon*, 6 Wis. 497; *Coleman v. Hart*, 37 Wis. 180; *State v. Huck*, 29 Wis. 202; *Crumbly v. Bardon*, 70 Wis. 385. Looking at the language in the light of such rule, it must be held that the circumstances of the horses going upon the track must have some causal connection with the failure to fence, not the mere nonexistence of a fence at the time of the entry, or there is no liability because of the failure to fence. If the failure to fence did not reach to such entry because of the intervention of some other cause or condition, the statutory rule of absolute liability does not apply. That has been held in cases where horses were abandoned under such circumstances that it was certain they would go upon the right of way where they would be liable to be killed. *Corwin v. N. Y. & E. R. Co.* 13 N. Y. 42; *Missouri Pacific R. Co. v. Roads*, 23 Am. & Eng. R. Cas. 167; *Welty v. I. & V. R. Co.* 105 Ind. 55. In such circumstances it was held that the owner of the horses consented to their destruction; that his conduct was not mere contributory negligence, which would not be a defense under the statute, but was the sole proximate cause.

That the law-makers intended that the failure to fence should be at least a contributing cause to the entry of domestic animals upon the railway right of way in order to make the rule of absolute liability applicable, is quite clear, not only from their language, but from its being followed by a provision to the effect that in case of a failure to main-

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tain a fence after once constructed, the liability for the killing of domestic animals shall not extend to losses accruing in part from contributory negligence of the persons claiming compensation therefor, or losses accruing from defects in the fence existing without negligence on the part of the railway corporation. Here there was a superseding overpowering cause that intervened between the failure of duty to fence and the entry of the horses upon the right of way, which took the place of the defendant's negligence, so that it cannot reasonably be said that such negligence, either in whole or in part, produced the loss complained of. In following the chain of causation from the death of the horses back, we find it tied at the antecedent end to the condition created by the fire. Over that we cannot pass to reach the neglect to fence, which, under the circumstances, became a remote cause. Our duty ends when we trace the chain back to what must stand as the real producing cause. *Causa proxima et non remota spectatur.* The rule clearly applies that if, between an injury and prior negligence which might have produced it had the effect reached that far, there were a superseding cause, though not traceable to a responsible source, which, without the operation of the negligence contributing, produced the result complained of, the wrongdoer is not liable.

It follows necessarily from the preceding, that the trial court erred in holding that the defendant was liable for the loss of the two horses killed on the day of the fire. There was no contest as to the right to recover $360.94 under the third and fourth causes of action. Judgment in plaintiff's favor should have been limited to that, and costs taxed according to law. The judgment should have been otherwise in favor of the defendant. There is a statement in the motion papers indicating that there was an offer of judgment in the case made September 21, 1894. We are unable to find anything in the record indicating the nature of that offer, so

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as to determine how it legally affects the question of costs in the lower court; therefore no directions in regard to it can be made. The question of costs will therefore be left for such court to determine when the case again reaches it.

A careful examination of the printed case and briefs satisfies us that a strict compliance with the rules calls for much less printing than they contain. The case consists of 547 pages, much of which could have been omitted entirely, and the balance have been much condensed. There are four briefs, including a reply, consisting in the aggregate of a little less than 200 pages. The rules require but one brief, and permit, in addition, a reply. Where there are several counsel on the same side and they deem the interests of their client to require a division of labor and separate briefs to be filed, that is permissible; but the fact remains that only one brief on a side is called for by the rules, though disbursements for others, permitted in proper cases, may be allowed. The allowance ordinarily, as a matter of right, however, goes only for one brief on a side and the permitted reply, as it is only necessary printing that is taxable against the losing party. *Paine v. Trumbull*, 33 Wis. 164. It is considered that 300 pages would have covered all printing that was reasonably necessary on this appeal, on the part of the appellant; therefore disbursements in this court on that account must be limited to that amount of printing.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment in favor of the plaintiffs for $360.94, and in favor of the defendant as to the first and second causes of action in the complaint, costs in the lower court to be taxed and allowed according to law; costs for printing on this appeal to be taxed as indicated in the opinion.

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DANIELS, Appellant, vs. THE CITY OF RACINE, Respondent.

March 1 — March 22, 1898.

Municipal corporations: Notice of injury by defective sidewalk: Constitutional law.

The provision of sec. 1339, R. S. 1878, as amended by ch. 223, Laws of 1897, limiting the time for service of notice of injuries caused by defects in highways and streets to "thirty days in the case of any county or town, and fifteen days in the case of any city or village," is not unconstitutional, either because the time prescribed is unreasonably short, or because a different limitation is prescribed in case of counties and towns from that prescribed in case of cities and villages.

APPEAL from a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Affirmed.*

The case is stated in the opinion.

For the appellant there was a brief by *Ritchie & Heck*, and oral argument by *M. W. Heck*. They argued that ch. 236, Laws of 1897, limiting the time for giving notice of injury to fifteen days in cities and villages, is in violation of sec. 9, art. I, Const., in that it makes the time unreasonably short. *Hughes v. Fond du Lac*, 73 Wis. 382; *Durkee v. Janesville*, 28 id. 464; *Hincks v. Milwaukee*, 46 id. 559. It in effect bars of their remedy those who have suffered the greater injury and been disabled from giving the notice within the time fixed by statute, and creates a discrimination in favor of cities and villages as against towns and counties. It conflicts with the essential spirit of our fundamental laws, and that is sufficient to render it unconstitutional. *Bull v. Conroe*, 13 Wis. 237; *Janesville v. Carpenter*, 77 id. 303; *Durkee v. Janesville*, 28 id. 464, 467, 469.

C. C. Gittings, for the respondent.

CASSODAY, C. J. This is an action for personal injury sustained by the plaintiff by reason of an alleged defective sidewalk. The complaint alleges, in effect, that the sidewalk on

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the south side of Eighth street was built of pine planks laid on pine stringers, and extended from Washington avenue westward over 200 feet in length; that August 5, 1897, and for several months immediately prior to that date, said sidewalk was and had been out of repair and in an unsafe condition for travel; that many of the planks were rotten, decayed, loose, and broken, and many of the stringers were rotten and decayed, and the defendant had negligently permitted the same during all of that time; that on the day named the plaintiff, while carefully walking on said sidewalk at a point designated, was, by reason of such unsafe condition and without fault on her part, tripped, and violently thrown to the ground, and thereby sustained serious injury, for which she claims $5,000 damages; that August 26, 1897, the plaintiff caused to be served on the defendant's city clerk a notice in writing stating the time and place where her damage occurred, and describing the insufficiency and want of repair of the sidewalk which caused it, and prayed judgment accordingly. To such complaint the defendant demurred on the ground that it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action. Upon the hearing of the cause the court entered an order sustaining the demurrer, and thereupon entered judgment dismissing the complaint. From that judgment the plaintiff brings this appeal.

The demurrer was sustained on the ground that the notice required by R. S. 1878, sec. 1339, as amended by Laws of 1897, ch. 236, was insufficient. By that amendment the notice of ninety days, as originally required, was reduced to "thirty days in the case of any county or town, and fifteen days in the case of any city or village." Prior to that amendment this court had repeatedly held, in effect, that a complaint which failed to allege the giving of the notice required by the statute was defective, and that such defect could be taken advantage of by demurrer. *Benware v. Pine Valley*, 53 Wis. 527; *Wentworth v. Summit*, 60 Wis. 281; *Flieth v.*

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Wausau, 93 Wis. 446. Our statutes on highways were borrowed from Massachusetts. Several years ago they were extended to cities. R. S. 1878, sec. 1347; *Huston v. Ft. Atkinson*, 56 Wis. 354. At an early day it was held in Massachusetts that at common law no action could be sustained against a town for damages by reason of a defective highway. *Mower v. Leicester*, 9 Mass. 247; *Holman v. Townsend*, 13 Met. 297, 300; *Sawyer v. Northfield*, 7 Cush. 494. The same rule was applied to cities. *Barry v. Lowell*, 8 Allen, 127. In *Oliver v. Worcester*, 102 Mass. 499, the court said: "To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike, and from the performance of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. Such is the well-settled rule in actions against towns or cities for defects in highways." In a later case, GRAY, C. J., in a very lengthy and learned opinion, reviews the English and American cases, and states as his conclusion: "There is no case in which the neglect of a duty imposed by general law upon all cities and towns alike has been held to sustain an action by a person injured thereby against a city when it would not against a town. The only decisions of the state courts in which the mere grant by the legislature of a city charter authorizing and requiring the city to perform certain duties has been held sufficient to render the city liable to a private action for neglect in their performance when a town would not be so liable are in New York since 1850, and in Illinois." *Hill v. Boston*, 122 Mass. 344, 379. That opinion is expressly considered and sanctioned by Mr. Dillon in his valuable work. 2 Dillon, Mun. Corp. (4th ed.), §§ 965, 1022. The principles of that case were reaffirmed in *Pettingell v. Chelsea*, 161 Mass. 368. There certainly was no common-law liability for the mere want of repair in a sidewalk as alleged in the case at bar.

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2 Dillon, Mun. Corp. § 990. This is in harmony with the rulings of this court. *Stilling v. Thorp*, 54 Wis. 532; *McKibben v. Amory*, 89 Wis. 609.

Since the only right of action in the case at bar was given by statute, there can be no question but that the legislature had the power to wholly take it away by statute. *Dillon v. Linder*, 36 Wis. 344; *Rood v. C., M. & St. P. R. Co.* 43 Wis. 146; *McLimans v. Lancaster*, 63 Wis. 600, 601. The power of the legislature to take away the right of action entirely necessarily included the right to annex such conditions upon the exercise of such right as the legislature might prescribe. It has been quite common in city charters in this state to shorten the time for giving such notice. This court sustained a charter provision giving only thirty days' notice in such a case. *McKibben v. Amory*, 89 Wis. 607. In a recent case in Connecticut a statute requiring only fifteen days' notice in such a case was held to be constitutional. *Crocker v. Hartford*, 66 Conn. 387. And the same was substantially held in a recent case in Maine. *Chase v. Surry*, 88 Me. 468.

The amendment to the statute in question applies to all cities and villages. The mere fact that it requires double the time in the case of any county or town that it does in the case of any city or village is no objection. The constitution does not require uniformity in that respect. *McKibben v. Amory, supra.* The case is clearly distinguishable from *Durkee v. Janesville*, 28 Wis. 464; *Hincks v. Milwaukee*, 46 Wis. 559; *Hughes v. Fond du Lac*, 73 Wis. 380. It is true, the statute requiring such notice is broad enough to include causes of action against municipalities which existed at common law, as well as causes of action created only by statute. *Hughes v. Fond du Lac, supra*, was such a case.

We must hold that the demurrer was properly sustained.

By the Court.—The judgment of the circuit court is affirmed.

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See ESTATES OF DECEDENTS, 5. INSURANCE, 8, 9. SALE OF CHATTELS, 3. VENDOR AND PURCHASER, 4.

1. In an action against the vendors of logs to recover a commission for effecting the sale thereof, there was evidence tending to show, among other things, that February 20th the purchaser wrote the

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plaintiff inquiring for logs; that in February or early in March the defendants agreed to pay the plaintiff for finding a purchaser for the logs whatever the same should bring over and above a certain price; that March 5th the plaintiff informed said purchaser that defendants' logs could be had at the price subsequently paid for them, and recommended their purchase; and that the purchaser thereupon called upon the defendants and made the purchase. There was no evidence that the purchaser ever paid, or offered or promised to pay, to the plaintiff anything for securing such purchase. *Held*, that a finding that the plaintiff was the agent of the defendants, and not of the purchaser, was sustained by the evidence. *McKenzie v. Lego*, 364

2. A provision in the contract for the purchase of the logs that the plaintiff should review and inspect the scale made by the defendants when the logs were banked, would not affect his right to recover commissions earned under the contract with the defendants, his services under the former contract being independent of those performed under the latter. *Ibid.*

3. An agent employed to procure a purchaser for logs at a fixed price, without authority to make or close a contract for the sale thereof, becomes entitled to his commission when he produces a responsible purchaser ready and willing to purchase them at the price agreed upon. *Ibid.*

4. The mere fact that a person was the lumber inspector in one district did not preclude him from making a contract by which he was to receive a commission for procuring a purchaser for logs situated miles away in another district. *Ibid.*

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From what appeal may be taken: Orders. See ATTACHMENT, 2.

1. Since the passage of ch. 212, Laws of 1895, an order changing the venue of an action on the ground of convenience of the witnesses is not appealable; subd. 4, sec. 3069, R. S., under which such orders were formerly held appealable having been eliminated by that act. Remarks in *Western Bank v. Tallman*, 15 Wis. 92, *held obiter* and disapproved. *Evans v. Curtiss*, 97

2. An order refusing to vacate a judgment on cognovit is an order affecting a substantial right made upon a summary application after judgment, and is therefore appealable under subd. 2, sec. 1, ch. 212, Laws of 1895, even though the judgment was for less than $100 and for that reason not appealable. *Purcell v. Kleaver*, 102

3. Under ch. 212, Laws of 1895, an order refusing to grant a new trial is not appealable. *Brown v. Edward P. Allis Co.* 120

4. Under ch. 212, Laws of 1895, an order denying a motion to dismiss an action under sec. 3072*a*, S. & B. Ann. Stats., because the costs were not paid and the cause brought to trial within one year after reversal of a judgment in plaintiff's favor, is not appealable. *Raymond v. Keseberg*, 317

5. An order dismissing, on the ground of a want of jurisdiction, an appeal from the disallowance by the common council of a claim

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against a city, effectually terminated the proceeding and prevented a judgment from which an appeal might be taken, and hence is appealable under subd. 1, sec. 1, ch. 212, Laws of 1895. *Mason v. Ashland*, 540

6. An appeal from an order directing a complaint to be made more definite and certain will be dismissed unless there was an abuse of discretion. *Crowley v. Hicks*, 566

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7. On appeal by a mortgagor from an order confirming a sheriff's report of sale on foreclosure, the purchaser is the principal adverse party, and must be served with the notice of appeal, under sec. 3049, R. S. *Rogers v. Shove*, 271

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8. A motion for a new trial on the general ground of errors in the instructions is insufficient to bring up for review any specific instruction. *Candrian v. Miller*, 164

9. Findings of fact cannot be reviewed on appeal unless exceptions thereto are preserved in the bill of exceptions. *Schuster v. Albrecht*, 241

10. Same point. *Treloar v. Osborne*, 461

11. Findings of fact by the trial court cannot be reviewed on appeal in the absence of a bill of exceptions. *Billings v. Oneida Co.* 584

12. The objection that the complaint fails to state a cause of action cannot be raised for the first time on appeal. *Bigelow v. Washburn*, 553

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13. Findings of the trial court will not be disturbed on appeal unless they are against the clear preponderance of the evidence. *Ames v. Storer*, 372

14. The fact that different minds might well arrive at opposite conclusions upon a consideration of the evidence is not a ground for disturbing findings of the trial court which are well sustained by competent evidence. *Conger v. Dingman*, 417

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15. A decision of the trial court that the plaintiff in an action for a personal injury by negligence was, as a matter of law, guilty of contributory negligence, must be affirmed on appeal, unless it is clearly erroneous. *Powell v. Ashland I. & S. Co.* 35

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16. In a case where the evidence extends over a hundred printed pages, a brief in which no specific assignment of errors is made and no specific error of fact is pointed out or relied on, except the general contention that the judgment should have been given in favor of the appellant, is criticised for failure to comply with Supreme Court Rule IX. *Conger v. Dingman*, 417

17. The rules require the printing of a case by the appellant, and one brief on each side, on appeal to this court; they also permit a

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reply on each side. Costs as of right, for printing, are limited to such as is reasonably necessary or permitted under the rules. *Cook v. M., St. P. & S. S. M. R. Co.* 624

Costs. See APPEAL, 4, 17.

18. An appeal from a judgment of foreclosure on the sole ground that it provides that the amount due thereon shall bear interest at a rate in excess of the minimum legal rate, in violation of sec. 3164, R. S. 1878, as amended by ch. 303, Laws of 1891, is without merit where the attention of the trial court was not called to the obvious mistake; and on reversal of the judgment, as required by Supreme Court Rule XXXII, no costs will be allowed except that respondent will be required to pay the fees of the clerk of this court. *Windoss v. McKillop,* 525

Failure to bring cause to trial after reversal: Right to dismissal. See APPEAL, 4.

19. The right of a defendant under sec. 3072*a*, S. & B. Ann. Stats., to have the complaint dismissed because the costs were not paid and the cause brought to trial within a year after the reversal of a judgment in plaintiff's favor, is *held* to have been waived, where plaintiff procured the record to be remitted within two months, and active negotiations for a settlement were soon commenced, which were continued until it was too late to put the cause upon the calendar of any term within the prescribed time, especially where defendant accepted the costs before the new trial began and retained them. *Raymond v. Keseberg,* 317

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Appeal from county court.

20. Under sec. 4031, R. S. 1878 (providing that "in all cases not otherwise provided for, any executor, administrator, trustee, or any person aggrieved by any order, judgment, decree, determination, or denial of the county court . . . may appeal therefrom to the circuit court," etc.), the circuit court has jurisdiction to amend or correct the records of the county court upon appeal from an order of that court denying a petition for their correction. *Heminway v. Reynolds,* 501

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ATTACHMENT.

See LIENS, 4.

1. The traverse of an affidavit for attachment by both the debtor and his assignee for the benefit of creditors, is *held* sufficient. *Teweles v. Lins*, 453

2. The determination of the court on the issue raised by the traverse of an affidavit for attachment is an order, and may be reviewed on a direct appeal therefrom without any exception to it having been taken. *Ibid.*

3. An attachment issued on the ground that defendant had fraudulently contracted the indebtedness to plaintiff, may be sustained as to a part of such indebtedness and dissolved as to the remainder. *Ibid.*

4. Cross demands between the parties cannot be established and adjusted on the trial of the issue raised by the traverse of an affidavit for attachment. *Ibid.*

ATTORNEYS AT LAW.

See DISTRICT ATTORNEY.

1. Repeated statements that one of plaintiff's witnesses had been corrupted by the defendant's agents, made by plaintiff's counsel in the presence of the jury while endeavoring to obtain permission to treat such witness as an adverse witness and to read his deposition, which could not be used under sec. 4089, R. S., because the witness was present in court, are *held* to have been so prejudicial to defendant as to warrant reversal of a judgment for plaintiff. *Sutton v. C., St. P., M. & O. R. Co.* 157

2. This court will not take judicial notice of the fact that a person whose name appears upon its roll of attorneys had removed from the state at the time he signed a notice of appeal. *Ibid.*

ATTORNEYS' FEES. See COSTS.

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BENEFIT ASSOCIATIONS. See INSURANCE, 1, 2.

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BILLS AND NOTES.

See GIFTS. LIMITATION OF ACTIONS, 1. PLEADING, 1. SALE OF CHATTELS, 4, 5.

1. In an action by indorsers of a note against a prior indorser (the payee), the complaint alleged that defendant was indebted to plaintiffs; that they had refused to accept the note as a payment on such indebtedness, but had aided him in procuring a purchaser for the note, and to that end had indorsed it for his sole accommodation and benefit; that the entire consideration was paid by the purchaser to him, and that he paid the amount so received to plaintiffs, who credited him therewith on his indebtedness to them; that plaintiffs had been compelled to pay the note; and that, after crediting defendant with a payment made by him on account of his liability as prior indorser and with the proceeds of mortgage security, a balance remained due. The answer substan-

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tially admitted the facts stated, but alleged that plaintiffs received the note as so much paid upon defendant's indebtedness to them; that he indorsed the note at their request and for their benefit; and that just before the foreclosure sale plaintiffs agreed to bid on the sale and protect and save him harmless from any liability on the note. The answer further alleged that before the commencement of the action the defendant fully paid, satisfied, and discharged any and all claims which the plaintiffs might have against him by reason of the transaction; but no counterclaim was pleaded, and there was no evidence of any payment except as stated. *Held*, that the defense was contrary to the very nature of the transaction, and wholly without merit. *Morgan v. Hayes*, 313

2. A note given to a bank for its accommodation was transferred for value, before due, to one who did not know that it was accommodation paper, and was indorsed by the bank and its president. Prior to its maturity the indorsee sent the note to the bank for collection, but received no returns. Afterwards, acting upon the belief, induced in part by the conduct of the maker, that the note had been paid, he brought an action against the bank and its president for money had and received, and obtained a verdict. Before the entry of judgment he learned that the note had not been paid, but the judgment was nevertheless entered and execution issued and levied, partially satisfying the judgment. *Held*, that there had been no election of a remedy which would preclude an action by the indorsee against the maker on the note. *Bank of Lodi v. Washburn E. L. & P. Co.* 547

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1. The question being as to the original location of a stake marking the corner of a lot, proof that the measurements from the nearest known original stakes on the same line, or points established as correct according to the original survey, reached a location for the disputed corner consistent with that claimed by one of the parties, is admissible in corroboration of her evidence respecting the former location of the stake. *Lewis v. Prien*, 87

2. The proper method of procedure in locating a lost exterior corner of an inside lot in a block is to start at the nearest known point on one side of the lost corner on the line on which it was originally established, measure to the nearest known corner on the other side on the same line, and, if the length of the line is in excess of that called for by the original survey, divide it between the tracts connecting such two known points, in proportion to the length of the boundaries of such tracts on such line, as given in the survey. To establish such lost corner by measuring from a corresponding lot corner on the other side of the block, parallel with the opposite side of the lot, to the intersection with the boundary of the block in which the lost corner is located, is erroneous. *Ibid.*

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CHATTEL MORTGAGES.

The evidence in this case is *held* to show that the mortgagee of a stock of merchandise permitted the mortgagor to remain in possession of the mortgaged property under an implied or tacit agreement that the latter might use, sell, and dispose of the mortgaged property and apply the proceeds to his own use as if the mortgage had not been executed; that the situation of the parties and property was such that the mortgagee must have known the mortgagor to be dealing with the property in that manner; and that the mortgagee made no objection. The mortgage was therefore fraudulent and void as to attacking creditors. *Bank of Kaukauna v. Joannes*, 321

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CLAIMS.

Against the state.

1. Sec. 3200, R. S. 1878 (providing that "it shall be competent for any person deeming himself aggrieved by the refusal of the legislature to allow any just claim against the state, to commence an action against the state, by filing a complaint" with the clerk of the supreme court, etc.), relates only to claims which, if allowed, render the state a debtor to the claimant, and does not include a demand based upon unlawful and tortious acts of officers and agents of the state. *Houston v. State*, 481

2. The legislature never having authorized an action against the state for unlawful and tortious acts of its officers or agents, no such action can be maintained. *Ibid.*

Against cities. See MUNICIPAL CORPORATIONS, 6–8.

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For liens. See LIENS, 1, 2, 8, 10, 11.

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CLOUD ON TITLE.

1. In an action to remove a cloud from, or to quiet, title to real estate under the laws of this state, the provision of sec. 3186, R. S. 1878, to the effect that it shall be sufficient as to the hostile title or interest to aver in the complaint that the defendant makes some claim to the property is satisfied by alleging facts from which the hostile claim of title or interest is raised as a necessary or reasonable inference. *Broderick v. Cary*, 419

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2. Allegations to the effect that the property was levied upon and sold on an execution issued on a judgment against a stranger to the title; that certificates of sale in due form of law were issued, delivered, and filed, pursuant to such sale, according to the statutes in such cases; and that such certificates are still outstanding and of record, sufficiently show the hostile claim of title, and satisfy the requirement of the statute. *Ibid.*

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A foreign corporation cannot be allowed, on the ground of interstate comity, to maintain in the courts of this state actions or proceedings denied to residents of the state or other suitors in its courts. *State ex rel. Fowler v. Circuit Court,* 143

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COMMON SCHOOLS.

1. A special meeting of a school district board attended only by two of the members, who had called the meeting by serving on the third member a notice which failed to state the place where it was to be held, was not a legal meeting. *School District v. Baier,* 23
2. A contract with a teacher attempted to be authorized at such meeting is void, especially with one not holding a certificate authorizing her to teach: and if the treasurer pays the salary of such teacher without the proper order of the clerk therefor, he and his surety are liable on his bond. *Ibid.*

CONDEMNATION OF LAND. See RAILROADS, 1–3.

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CONTEMPT.

See INJUNCTIONS, 3.

1. In contempt proceedings to punish a defendant in an action to foreclose a land contract for violation of an order forbidding the removal of logs from the land, the evidence is *held* to show that such defendant was the active moving party in violating the order, notwithstanding his statement that a corporation of which he was president, formed about the time the logs were removed, committed the act without his knowledge or consent. *Hessey v. Gund,* 531

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2. The mere fact that a defendant signed and mailed to his attorney the bond required by an injunctional order as a condition of relief therefrom, does not relieve him from the charge of contempt in violating the order, where the bond never came to the knowledge or possession of the plaintiff, or his attorney, or the clerk of the court. *Ibid.*

CONTRACTS.

See AGENCY. COMMON SCHOOLS, 2. ESTATES OF DECEDENTS, 1, 2, 5. EVIDENCE, 1. INSURANCE, 4–16. LIENS, 2. LOGS AND LUMBER. MARRIED WOMEN. MASTER AND SERVANT, 1, 2. MUNICIPAL CORPORATIONS, 4. PARENT AND CHILD. PLEADING, 8. TOWNS, 2–4. VENDOR AND PURCHASER.

By a proposition in writing, made September 18, plaintiff offered to sell to defendant a quantity of lumber of specified dimensions "at $10 per thousand, straight measure, as now piled on their mill dock, or $12 per thousand" delivered at T., lake freights to be paid cash on delivery. The defendant was to accept by wire within two days. It was to be optional with defendant whether to give ninety days' paper or pay cash when the lumber was delivered. The defendant on the same day indorsed thereon the following: "I accept the above price as quoted on [plaintiff's] dock; will wire acceptance on balance contract 20th." On September 21 defendant wired plaintiff to "call off the trade made on the 18th." *Held*, that there was no completed contract, the reservation in the acceptance having been intended to afford opportunity for necessary examination or inspection of the character and quality of the lumber. MARSHALL, J., dissents, being of the opinion that such acceptance merely reserved to the defendant the right to say within two days whether he would pay $2 per thousand extra for delivery at T. *Shores Lumber Co. v. Patterson*, 534

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Foreign corporations: Use of name: Right to license. See INSURANCE, 1, 2.

Same: Actions by and against. See COMITY. INJUNCTIONS, 1, 2.

Same: Deposit of securities: Insolvency.

1. The directors of a foreign building and loan association constituted the state treasurer a depository "for the purpose of temporary convenience in complying with the laws of Wisconsin in regard to the deposit of securities," and resolved to "comply with the Wisconsin law as soon as possible." Shortly thereafter officers of the association deposited with said treasurer over $100,000 of its securities, and the association received a license to do business in

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this state. Secs. 2014*a*, 2014*b*, S. & B. Ann. Stats., under which the deposit was made, provided that said treasurer should hold the securities so deposited in trust until all shares held by residents of this state had been fully redeemed, and until the contracts and obligations of the association to persons and members residing in this state had been fully performed and discharged. When the first deposit was made the articles of incorporation of the association authorized the directors to dispose of its mortgages as provided by the by-laws, but no by-law on that subject had been passed. Within a few months the articles were amended so as to prohibit the association from disposing of its mortgages. Said articles also provided that the directors might enter into such contracts and agreements and appoint such agents as they may deem for the best interest of its affairs. The statutes of its domicile authorized such associations to deposit their securities in other states for the purpose of obtaining permission to enter and do business therein, and contained provisions regulating such transfers, apparently designed to facilitate the convenient using and tracing of the securities deposited for that purpose. The deposits were changed or renewed from time to time as occasion required, and a new license granted from year to year. The association became insolvent, and a receiver was appointed for it in the state of its domicile. Thereafter plaintiff, a resident shareholder, procured the appointment of a receiver in this state for the purpose of sequestrating the securities deposited with the state treasurer and distributing the proceeds among resident shareholders. To this action the first-mentioned receiver was made a party, and he appeared and claimed the securities. *Held:*

(1) That the securities would be presumed to have been deposited in a *bona fide* attempt on the part of the association to comply with the laws of this state.

(2) That the failure of the association to comply with the statutory provisions of the state of its domicile in making such deposit did not render the transfer void, compliance with such provisions having been intended as a matter of local administration merely, and not as a condition precedent to the right to make it.

(3) That such deposit was within the lawful power of the association as represented by its directors, and the action of the directors in making it was binding upon the association and all its members, to the extent and according to the terms of the statute under which it was made.

(4) That the receiver appointed in this state was entitled to retain and sell or collect the securities, and apply the proceeds to the redemption in full of all shares held by residents of this state and to the performance and discharge of all the association's contracts and obligations to members and persons residing herein, the residue if any to be turned over to the foreign receiver.

(5) That the corporation and its stockholders had waived the right to question the validity of the trust, or the constitutionality of secs. 2014*a*, 2014*b*, S. & B. Ann. Stats., on the ground that they impaired the obligation of contracts, even though in case of insolvency a preference was thereby secured to resident shareholders. *Lewis v. American Savings & Loan Asso.* 203

2. The legislature has power to pass laws for the protection of its citizens against irresponsible foreign corporations by requiring them, as a condition precedent to transacting business in this state, to deposit securities in trust for the redemption of their obligations to persons residing herein. *Ibid.*

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COSTS.

See APPEAL, 17-19.

Where separate judgments are rendered against insurance companies joined as defendants, whether originally so joined or thereafter by a consolidation of actions separately brought, the attorney's fees recoverable against each such defendant are limited to $20 under ch. 235, Laws of 1893. *St. Clara Female Academy v. N. W. Nat. Ins. Co.* 257

COTENANCY. See LIMITATION OF ACTIONS, 2.

COUNTERCLAIM. See PLEADING, 7. VENDOR AND PURCHASER, 6.

COUNTIES.

See DISTRICT ATTORNEY.

A county treasurer made a claim against his county for about $500 for extra services which were in fact within the line of his official duty, and the claim was allowed by the county board, and the money withdrawn by him from the county funds. After demand of, and refusal by, the county board, to compel a return of the money, this action was brought by plaintiff in his own behalf, and that of other taxpayers, to charge such treasurer as a trustee of such money, and to compel him to account for the same and pay it into the county treasury. *Held*, on a demurrer to the complaint setting up the facts:

(1) A salaried county officer, for the performance of the duties of his official position and service which he performs voluntarily as such officer by request of the governing body of the corporation, is entitled to his salary only.

(2) An officer who obtains public money from the treasury by forms of law, ostensibly for extra services, but to which he has no right in fact, does not thereby obtain title to such money, and on a failure of the proper officers to respond favorably to a demand by a taxpayer to compel a return of such money, such taxpayer may, acting in his own behalf and in behalf of other taxpayers, maintain an action to charge such officer as a trustee of such money, and to compel him to account for the same and pay it over to the rightful owner. *Quaw v. Paff*, 586

COUNTY COURTS.

See APPEAL, 20. ESTATES OF DECEDENTS, 3, 6, 7. TRUSTS AND TRUSTEES, 1. WILLS, 3-5.

Under sec. 2471, R. S. 1878 (providing that the county judge may adjourn any term of the court to his office, or to some other place, when the court cannot be conveniently held at the court house on account of the sitting of the circuit court, "or for any other cause"), the county judge of Dodge county had ample discretionary power to hold court at his office in a city other than the county seat for the purpose of hearing an order to show cause in a proceeding to execute a trust, made returnable at a special term of court to be held at that place. *Cody v. Cody*, 445

COUNTY OFFICERS. See COUNTIES. DISTRICT ATTORNEY.

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COURT AND JURY.

See APPEAL, 15. INSTRUCTIONS TO JURY. INSURANCE, 16. LIBEL, 2. LOGS AND LUMBER, 1. MASTER AND SERVANT, 11–13, 16, 25, 30–32. MUNICIPAL CORPORATIONS, 9, 11, 12. NEGLIGENCE. RAILROADS, 10. STREET RAILWAYS, 1, 2.

1. A court is not warranted in directing a verdict unless all the evidence produced, giving it the most favorable inference it will reasonably bear, and admitting that it establishes all that it tends to establish, would not sustain a verdict for the other party. The fact that the evidence preponderates one way so strongly that it would become the duty of the court to set aside a verdict to the contrary, does not warrant the court in taking the case from the jury. *Lewis v. Prien*, 87
2. Where all reasonable probabilities from facts unquestionably established by the evidence are on one side of a controversy, the testimony of an interested party to the contrary does not create a conflict of evidence requiring such controversy to be submitted to and determined by a jury or, if submitted, support their determination, if contrary to all such reasonable probabilities. *Flaherty v. Harrison*, 559

COURTS.

See APPEAL, 20. COMITY. COUNTY COURTS. INSURANCE, 2. JURISDICTION. TRUSTS AND TRUSTEES, 1.

A mere public nuisance, even though an aggravated one, does not affect the sovereignty, franchises, or prerogatives of the state, or the liberties of its people, so as to warrant the supreme court in entertaining an original action for an injunction. *In re Hartung*, 140

COVENANT to renew. See LANDLORD AND TENANT, 2–4.

CREDITORS' REMEDIES. See ATTACHMENT. CHATTEL MORTGAGES. FRAUDULENT CONVEYANCES. GARNISHMENT. INJUNCTIONS. LIENS. MUNICIPAL CORPORATIONS, 6–8. PARTNERSHIP. RECEIVERS. VOLUNTARY ASSIGNMENT, 4–8.

CRIMINAL LAW AND PRACTICE.

See MARRIAGE, 2.

1. In a criminal case, error in ordering the drawing of additional names from the supervisors' lists under ch. 126, Laws of 1895, when the regular panel was full, is *held* to have been cured, where, before the jury was completed, the court sustained the defendant's objection to the special jurymen so drawn, and discharged them, and directed the sheriff to summon additional jurymen from the body of the county as provided by sec. 2538, R. S. 1878, from whom, in addition to the regular panel, the jury was finally completed. *French v. State*, 341
2. No question as to the regularity of the jury in a criminal case is available on writ of error, where no objection of any kind was made to it in the trial court. *Ibid.*
3. The action of the trial court in a criminal case in permitting the testimony of a witness on a former trial to be read in evidence, in

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pursuance of an oral stipulation between the attorneys but against the objection of the defendant himself, cannot be reviewed on writ of error, unless such testimony is preserved in the bill of exceptions. *Ibid.*

4. A warrant, issued under the seal of a court having power to issue it, signed by the clerk, and tested in the name of the judge thereof, will be presumed to have been issued by the court or under its direction. *Grimshaw v. State,* 612

5. The reception in evidence, as against the plaintiff in error, of a statement or confession made in his absence by a codefendant when the latter was arrested and brought before the examining magistrate, cannot be held a prejudicial error, where the bill of exceptions, which is certified to contain all the evidence, does not contain such statement. *Ibid.*

6. Where the statement or confession of a defendant, made before the examining magistrate, had been taken down in shorthand and afterwards transcribed by the reporter, the admission of such transcript in evidence at his trial was not erroneous because a trifling and immaterial erasure or change had been made therein, especially where such statement was fully corroborated by the testimony of the defendant at the trial. *Ibid.*

7. In a prosecution for rape committed upon a girl who, although but fifteen years of age, weighed 125 pounds and was well developed and accustomed to all kinds of work, by a man whose acquaintance she had made that night at a country dance and who was accompanying her to the place where she worked, the circumstances established by the evidence, taking the testimony of the girl as true, are *held* so inconsistent with that resistance to the best of her ability and accomplishment of the outrage against her will, necessary to make out the crime, that the jury were not warranted in saying that guilt was established beyond a reasonable doubt. *Bohlmann v. State,* 617

8. A wife is not a competent witness against her husband in a prosecution for adultery. *Crawford v. State,* 623

CROSS-BILL. See PLEADING, 3, 4.

CUSTOM. See OFFICERS.

DAMAGES.

See LIBEL. SALE OF CHATTELS, 4.

An instruction, in an action for personal injuries, that if the jury "are satisfied from the evidence that the injury that the plaintiff suffered is permanent in its nature, and will continue to affect his health and physical condition in the future, . . . you should allow him, in addition, such sum as will reasonably compensate him for such pain and suffering and impairment of ability to earn a livelihood as he must suffer in the future," does not violate the rule that permanent disability must be found to be reasonably certain before such damages can be allowed. *Kenyon v. Mondovi,* 50

DEBTOR AND CREDITOR. See ATTACHMENT. CHATTEL MORTGAGES. FRAUDULENT CONVEYANCES. GARNISHMENT. INJUNCTIONS. LIENS. MUNICIPAL CORPORATIONS, 6-8. PARTNERSHIP. RECEIVERS. VOLUNTARY ASSIGNMENT.

DECEIT See SALE OF CHATTELS, 1-5.

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DEDICATION. See PLATS OF LAND.

DEEDS. See FRAUDULENT CONVEYANCES, 1. LIMITATION OF ACTIONS, 2. MORTGAGES, 3–8. NEW TRIAL, 1. PLATS OF LAND, 1. POWERS. RECORDING ACTS. TAX TITLES.

DEFINITIONS. See WORDS AND PHRASES.

DELIVERY of contract. See EVIDENCE, 1. INSURANCE, 7.

DEMAND. See ESTATES OF DECEDENTS, 7. TOWNS, 1.

DEPOSIT of securities by foreign loan association. See CORPORATIONS.

DISCRETION. See APPEAL, 14. COUNTY COURTS. VENDOR AND PURCHASER, 4.

DISMISSAL of action for failure to bring to trial. See APPEAL, 19.

DISTRICT ATTORNEY.

A district attorney cannot recover for services performed for his county in prosecuting appeals to the supreme court, where such services were rendered without expectation of receiving pay therefor, and both parties supposed at the time that they were rendered under his general employment as district attorney. *Billings v. Oneida Co.* 584

DIVORCE. See PARENT AND CHILD. TRUSTS AND TRUSTEES.

DODGE COUNTY COURT. See COUNTY COURTS. TRUSTS AND TRUSTEES, 1.

EJECTMENT. See NEW TRIAL, 1.

ELECTION between remedies. See BILLS AND NOTES, 2. GARNISHMENT. MUNICIPAL CORPORATIONS, 7. RAILROADS, 3. VOLUNTARY ASSIGNMENT, 5.

EMINENT DOMAIN. See HIGHWAYS, 2, 3. RAILROADS, 1–3.

EQUITY. See CLOUD ON TITLE. COUNTIES. COURTS. HOMESTEADS, 2. INJUNCTIONS. INSURANCE, 1, 2. JUDGMENT, 4. MORTGAGES. PARTNERSHIP, (2). PLEADING, 3, 5. RECEIVERS. SALE OF CHATTELS, 6. TAXATION, 1. TAX TITLES. TOWNS, 1, 5. TRUSTS AND TRUSTEES. VENDOR AND PURCHASER.

ESTATES OF DECEDENTS.

See APPEAL, 20. GIFTS. PLEADING, 14, 15. WILLS.

1. A provision in a contract with the state board of control for the construction of a warden's residence, that the balance of the contract price should be paid as soon as the board were satisfied that the work had been completed and were assured against the existence of any mechanics' liens on the building, was not inserted for the benefit of the material men or mechanics, but solely to protect the state against any possible expense or charge on account of such liens. A balance due the contractor, which had been paid over to his administrator after his death, did not, therefore, constitute a trust fund in the hands of the latter for the payment of claims of laborers or material men, so as to give them a preference. *Campbell & Cameron Co. v. Estate of Carnagie,* 99

2. The fact that a short time before the death of the contractor in such case he examined the account of a material man, agreed upon the balance due him, and orally promised to pay it when he received the balance due from the board of control, would not impress such balance with a trust in favor of the material man. *Ibid.*

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8. Upon final settlement of the estate of a testator there was no contest or dispute concerning the construction of the will, but it was understood and agreed by counsel for the executors, the guardian *ad litem* for the remainderman, and the county judge that the order assigning the residue should be substantially in the language of the will, and a judgment to that effect was orally announced and rendered; but by inadvertence or mistake the judgment as drawn by the attorneys for the executors and actually signed and entered was substantially different, the life tenant being given more apparent authority with reference to the disposal of the corpus of the estate. *Held*, that the record could be corrected, upon application of the remainderman after the death of the life tenant, so as to conform to the judgment actually pronounced and rendered. *Hall v. Hall*, 193

4. An administrator cannot maintain an action for the recovery of his decedent's real estate, unless it is shown that it is needed for the payment of debts or legacies. *Volk v. Stowell*, 385

5. Defendant and plaintiffs' testator entered into a contract providing that the defendant should manage the testator's farm for a term of five years; that he should receive therefor $30 per month, and in addition fifteen per cent. of the farm products and increase of stock, and should be allowed the use of certain buildings and a garden; that the testator might declare the contract forfeited only in case of failure or neglect of the defendant to perform it according to its true intent and meaning; and that upon the death of the defendant the contract should be determined and any wages due him should be paid to his heirs or legal representatives by the testator or "his heirs, representatives, or assigns, upon whom this contract shall be binding." By his will, made soon after, the testator bequeathed the revenues, benefits, and profits arising from said farm to his grandchildren, each to be paid his proper share thereof after attaining his majority, until which time said proceeds were to be paid to the testator's children. *Held*, that the contract vested in the defendant an agency or authority, coupled with an interest, which survived the testator and became binding on his heirs and personal representatives, and entitled the defendant to continue to manage the farm as stipulated in the contract. *Ibid.*

6. Under secs. 3853, 3856, 4014, R. S. 1878, to the effect that, after the time limited for creditors to file their claims in the settlement of the estate of a deceased person, the county court shall make an order for the payment of the debts in whole or in part, or a dividend thereon, according to the circumstances of the estate; that when the time shall have expired under such order or judgment, the executor or administrator and his bondsmen shall stand personally liable for such debts; that on refusal of such executor or administrator to comply with the demand for such payment, as to any creditor, an action may be brought against such executor or administrator and his bondsmen, for such debt, by permission of the court,—the order or judgment for payment, though made without notice, is not subject to collateral attack. Till reversed on appeal, or set aside in some direct proceeding for that purpose, it is conclusive on all the questions necessarily adjudicated and included within it, among others, that there is a sufficiency of assets to pay the debts. *Roberts v. Weadock*, 400

7. The order permitting suit on the bond may be entered without notice, and is not open to collateral attack. The condition precedent

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of demand for payment and refusal, which must precede the entry of the order, is not open to question except on appeal from the order, or in some direct proceeding to vacate or avoid it; and if that were not so, an allegation of demand and refusal in the complaint, not put in issue by the answer, is thereby admitted for the purposes of the action upon the bond. *Ibid.*

ESTOPPEL. See NEW TRIAL, 2. VENDOR AND PURCHASER, 5. VOLUNTARY ASSIGNMENT, 5.

EVIDENCE.

See BOUNDARIES, 1. CRIMINAL LAW, 3, 5–8. LIBEL, 3, 6. LIENS, 3. MARRIAGE. MASTER AND SERVANT, 1, 14, 26–29. NEW TRIAL, 3, 4. RAILROADS, 9, 10. WILLS, 4.

1. Parol evidence is admissible to show that a writing, which is in form a complete contract, of which there has been a manual tradition, was not to and did not become a binding contract until the performance or occurrence of some condition precedent resting in parol. *Nutting v. Minnesota F. Ins. Co.* 26

2. Communications to a physician of facts which it is necessary for him to know in order to treat a patient intelligently are privileged, and the privilege is that of the patient. *Kenyon v. Mondovi,* 50

3. A surgical expert who testifies that the plaintiff's injury was a severe sprain, may properly testify as to the results which usually or even sometimes attend or follow such an injury. Such testimony, based on his knowledge or experience, cannot fairly be regarded as speculative or conjectural. *Crites v. New Richmond,* 55

4. To rebut the presumption of a consideration raised by a written assignment of notes by a testator to his son, plaintiff's attorney testified that the son, in his deposition taken under sec. 4096, R. S., had stated that no consideration was paid. Thereupon the court held that the whole deposition, including those parts relating to personal transactions between the testator and his son, had become admissible on behalf of the son. Whether this ruling was wrong is not determined, but it is *held* that the error, if any, was not material, the trial being by the court and there being sufficient other competent testimony to support the judgment. In such a case the presumption on appeal is that only competent testimony had weight with the court. *McNally v. McAndrew,* 63

EXCEPTIONS. See APPEAL, 8–11. CRIMINAL LAW, 2, 3.

EXECUTIONS. See CLOUD ON TITLE, 2. HOMESTEADS. PARTNERSHIP. RECEIVERS.

EXECUTORS AND ADMINISTRATORS. See APPEAL, 20. ESTATES of DECEDENTS. GIFTS. PLEADING, 14, 15. WILLS.

EXEMPTIONS. See HOMESTEADS.

EXPERT TESTIMONY. See EVIDENCE, 3. MASTER AND SERVANT, 14, 27, 28. NEW TRIAL, 4.

FAILURE OF PROOF. See PLEADING, 1.

FALSE REPRESENTATIONS. See SALE OF CHATTELS, 1–5.

FEES. See JUSTICES' COURTS, 1.

FELLOW-SERVANTS. See MASTER AND SERVANT, 15, 18, 20.

FENCES. See HIGHWAYS, 3. RAILROADS, 5, 7.

FINDINGS of fact. See APPEAL, 8–10, 12, 13.

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FIRES negligently set. See RAILROADS, 4, 5.

FORECLOSURE. See APPEAL, 7, 18. LIENS, 4, 5, 7, 9. MORTGAGES, 4–8.

FOREIGN CORPORATIONS. See CORPORATIONS. INJUNCTIONS, 1, 2. INSURANCE, 1, 2.

FORFEITURE. See INSURANCE, 5, 6. LANDLORD AND TENANT, 1.

FRAUD. See ATTACHMENT, 3. FRAUDULENT CONVEYANCES. JUDGMENT, 3. PARTNERSHIP. PLEADING, 13. SALE OF CHATTELS, 1–6. TOWNS, 1, 5. VOLUNTARY ASSIGNMENT, 9.

FRAUDS, STATUTE OF. See CHATTEL MORTGAGES. PLEADING, 14.

FRAUDULENT CONVEYANCES.

See CHATTEL MORTGAGES. HOMESTEADS, 2. PARTNERSHIP.

1. Plaintiff commenced a tort action against the owner of a farm, in which she recovered judgment. Before the action was brought to trial the defendant conveyed the farm without consideration to his minor son, who lived with him on the farm, by a deed dated three years before it was executed and acknowledged. At the same time the son executed and delivered to his father a conveyance of the premises, in form a warranty deed, but in fact a mortgage to secure the payment of a note for $2,000. A finding that the conveyance to the son was fraudulent and void as to the plaintiff, is *held* to be sustained by the evidence. *Fischer v. Schultz*, 462

2. Findings of the trial court that, pending plaintiffs' actions against an insolvent debtor, the latter had conveyed lands to a corporation formed by him, with intent to hinder, delay, and defraud them in the collection of their demands, are *held* to have been based upon sufficient evidence and will not, therefore, be disturbed on appeal. *Cass v. Sutherland*, 551

GARNISHMENT.

See JUSTICES' COURTS, 1. VOLUNTARY ASSIGNMENT, 2, 5, 7, 8.

1. The principal defendant may procure the discontinuance of garnishment proceedings by giving the undertaking provided for in sec. 2771, S. & B. Ann. Stats., or he may move for their dismissal on the ground that he owned property subject to execution sufficient to satisfy the claim; and his election of the former remedy is a waiver of his right to resort to the latter, at least until he has been relieved of his election on equitable grounds. *Thoen v. Harnstrom*, 231

2. The mere fact that the defendant in such a case, at the time of making his election, was ignorant of facts upon which he subsequently moved to dismiss the proceedings is insufficient to warrant the setting aside of such election, where such ignorance was the result of an unexcused failure to resort to means of knowledge reasonably within his reach. *Ibid.*

GIFTS.

There being evidence to show that a testator had delivered notes and a mortgage to his son as a gift, with the understanding that the testator should receive the interest on them as long as

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he lived, further evidence that the notes were afterwards returned to the testator to enable him to collect the interest, and were found among his papers after his decease, did not establish the fact that there had been no gift *in præsenti* or that there had been a revocation or surrender of the gift. *McNally v. McAndrew*, 62

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 9–13. RAILROADS, 6–10. TAXATION, 4. TOWNS, 2, 3.

1. In order that a road may become a legal highway under sec. 1295, R. S. 1878, by reason of its having been laid out and recorded and worked for three years, there must be at least an order laying out the highway, made by the proper officers and filed in the office of the town clerk of the town in which it is situated. *Beyer v. Crandon*, 306
2. The laying out of a highway is not the taking or appropriation of the land for public use. Until the highway has been opened by order of the supervisors, the public acquires no right to its use, and the owner may use the land in the same manner as he did before the highway was laid out. *Kellar v. Earl*, 488
3. Under sec. 1284, R. S. 1878 (providing that whenever a highway is laid out through inclosed, cultivated, or improved lands the supervisors shall give the owner or occupant notice to remove his fences within such time as they may deem reasonable, not less than thirty days, and that no person shall be required to remove such fences between April 1 and November 1 in any year), and sec. 1337 (providing that no person shall be required to remove any fence under the provisions of secs. 1334–1336, except between November 1 and April 1, unless the same shall have been made within three months next before the making of the order for removal), an order served September 27, requiring a landowner to remove his fence within forty-five days, and an order served October 25, requiring him to remove it within thirty days, were nullities, where such fence had not been built within three months of the making of the orders. *Ibid.*

HOMESTEADS.

1. A mortgage covering a homestead and other lands was foreclosed and the entire premises sold, the nonexempt portion being worth less than the amount of the debt. *Held*, that the surplus money remaining after satisfaction of the mortgage debt should be deemed proceeds of the sale of the homestead, and exempt from execution, under sec. 2983, R. S. *Clancey v. Alme*, 229
2. In an action to set aside as fraudulent a conveyance of land, part of which was a homestead, and to subject the land to the lien of plaintiff's execution, the debtor by failing to make selection of his homestead or to claim any specific part of the land as such in his answer, waived his statutory right of selection; and it thereupon became the duty of the court, in order to prevent further litigation, to set off a homestead for him. *Fischer v. Schultz*, 462

HUSBAND AND WIFE. See CRIMINAL LAW, 8. MARRIAGE. MARRIED WOMEN. PARENT AND CHILD. VENDOR AND PURCHASER, 3.

INCOMPETENCY of fellow-servant. See MASTER AND SERVANT, 20, 24, 25.

INFANTS. See MASTER AND SERVANT, 7. PARENT AND CHILD.

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INJUNCTIONS.

See CONTEMPT. COURTS. INSURANCE, 1, 2.

1. A foreign corporation, doing business and owning property in this state, became insolvent and its business was suspended by proceedings against it in another state, instituted by its creditors, in which a receiver had been appointed. Another foreign corporation, a mere creditor at large of the former, without attempting to obtain a lien of any kind upon its property, commenced in this state an action against it and procured the appointment of an ancillary receiver and an injunction restraining all the other creditors from prosecuting actions at law to enforce collection of like demands. *Held*, that the granting of such injunction was contrary to equity practice and well-established principles of interstate comity; and that it was not authorized by sec. 3227, R. S. (providing that at any stage in proceedings against insolvent corporations "the court may restrain all proceedings by any other creditor against the defendant in such action"),—secs. 3216–3228 being applicable only to proceedings against insolvent domestic corporations. *State ex rel. Fowler v. Circuit Court*, 143

2. The granting of the injunction in such a case, although ill-advised and erroneous, was not absolutely void, since the court had jurisdiction of the subject matter — the administration of the assets of an insolvent corporation — and of the parties. *Ibid.*

3. The fact that an injunction issued by a court having jurisdiction was erroneous affords no justification or excuse for its violation; but such fact may properly be taken into consideration in awarding punishment for its breach. *Ibid.*

INSOLVENCY. See CORPORATIONS. INJUNCTIONS, 1, 2. RECEIVERS. VOLUNTARY ASSIGNMENT.

INSTRUCTIONS TO JURY.

See APPEAL, 8. DAMAGES. LIBEL, 2. MASTER AND SERVANT, 12, 13, 16, 30, 31. NEGLIGENCE, 3. SALE OF CHATTELS, 2, 3.

1. A refusal to give special instructions asked, is not error if, though correct in themselves, they are substantially given in the general charge. *Kenyon v. Mondovi*, 50

2. An instruction which, standing alone, might mislead the jury is not error when so qualified as not to have that effect. *Ibid.*

3. An instruction that the jury should find a verdict upon the *preponderance* of the evidence is *held* not to have been error, where they were further told in the same connection that they should make their answers in accordance with their *conviction* or *belief*, from the evidence, as to what the truth really was. *Curran v. A. H. Stange Co.* 598

INSURANCE.

Foreign benefit association: Use of name: Right to license.

1. A foreign fraternal or beneficiary association which has conducted business under a certain name or designation for many years will not be restrained from the use of such name at the suit of a domestic association, organized under a similar name for similar purposes more than ten years after the former commenced to transact

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business in this state. *High Court Wis. I. O. F. v. Commissioner of Insurance,* 94

2. The question whether a foreign fraternal benefit association is entitled to a license to transact business in this state, under ch. 418, Laws of 1891, is a matter to be decided by the proper authorities of the state, and cannot be determined in advance by the courts, in an action brought by another corporation to restrain the issuance of the license. *Ibid.*

Joinder of insurance companies as parties. See COSTS.

Life insurance.

3. Where the act incorporating a mutual life insurance company (sec. 4, ch. 43, P. & L. Laws of 1869) conferred upon the board of directors power to enact, repeal, alter, or amend all by-laws, rules, and regulations for the management of the affairs of this company not inconsistent with the provisions of this charter, nor contrary to the constitution and laws of the United States, that body had power to pass a by-law providing that certificates of membership should be rendered absolutely void in case the insured came to his death by his own hand in any manner other than by accident. *Hughes v. Wis. O. F. Mut. Life Ins. Co.* 292

4. Where a member of a mutual life insurance company stipulated in his application, which formed part of the contract of insurance, that he would "conform in all respects to the by-laws, rules, and regulations of this company now in force, *or which may be hereafter adopted* by the same or its board of directors," he and his beneficiaries are as effectually bound by an amendment to the by-laws, adopted by the board of directors after the policy took effect, avoiding it in case the insured committed suicide, as if such by-law had been in force at the time he became a member. *Morrison v. Wis. O. F. M. L. Ins. Co.* 59 Wis. 162, distinguished. *Ibid.*

5. A mutual life insurance company did not waive its right to insist upon a forfeiture by accepting and retaining proofs of loss and paying two other policies, without objection, and arranging with the beneficiary, through its secretary, for her to attend meetings of the board of directors at which the matter of her claim was to be considered, notwithstanding she incurred some expense in attending such meetings. *Ibid.*

6. The charter and by-laws of a mutual insurance company provided for assessments on members whenever, in the opinion of the secretary, the policy fund was insufficient to pay outstanding unpaid losses. Notice of an assessment to replenish such fund stated that the company had received notice and proof of death of plaintiff's insured and eleven others, specifying the amount for which each was insured. It was not shown how much, if any, of this assessment was collected, or that any specific part of it was paid, collected, or appropriated to pay the plaintiff's claim. *Held,* that such replenishing of the policy fund did not involve any admission of liability on account of plaintiff's claim, or any waiver of a forfeiture of the policy under which she claimed, by reason of the suicide of the insured. *Ibid.*

Fire insurance.

7. An insurance agent, on handing a policy to the broker who was acting for the insured, said that he would like to keep it a few days until he knew whether the insurer would carry the risk, and then took it away and retained it, and did not notify the broker of the insurer's refusal to carry the risk. *Held,* that there was no

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completed contract of insurance, because the policy was never delivered. *Nutting v. Minnesota F. Ins. Co.* 26

8. Where an insurance policy contains a provision to the effect that it shall be void if the title of the assured to the property covered by the policy is other than sole and unconditional, if the agent who solicits the insurance, receives and transmits the application, delivers the policy, and receives the premium, knows at the time of such delivery that the title of the assured is other than sole and unconditional, the provision in that regard is waived; and such is the case notwithstanding the policy also contains a provision prohibiting the agent from waiving any of its conditions, except in writing thereon or attached thereto. *St. Clara Female Academy v. N. W. Nat. Ins. Co.* 257

9. Where such agent knows that the interest of the assured is other than sole and unconditional, and insures the whole title, if the assured has an insurable interest, the recovery on the policy in case of loss is not affected by the mere fact that another person also had an interest therein. *Ibid.*

10. When a building has been so damaged as to lose its specific character as such, and it can no longer be called a building, then it is wholly destroyed within the meaning of sec. 1943, R. S. *Ibid.*

11. When the structure has been destroyed so as to leave nothing but badly damaged foundation walls, it has been wholly destroyed as a matter of law, within the meaning of the statute referred to. *Ibid.*

12. The words "wholly destroyed," as used in the statute, refer to the thing insured, not solely its value. *Ibid.*

13. If a building, when in process of construction under an entire building contract which provides that the owner shall insure it in the names of the owner and contractor for such sums from time to time as they may agree upon, loss, if any, payable as their interests shall appear, be insured by such owner in his own name alone, but for a sum intended to cover the entire property, no agreement having been made with the contractor under the terms of the contract, and it be destroyed and thereafter rebuilt by such contractor, the amount recoverable on the policies cannot be diminished:
(a) From the mere fact of such restoration;
(b) In any event, unless the facts showing such restoration solely under the terms of the building contract are pleaded as a defense and established by evidence;
(c) From the fact that some other person whom the assured had a right to represent had an interest in the property. *Ibid.*

14. Under the rule that where the language of a contract is plain and unambiguous, and where words or terms in a contract may be reasonably construed in either of two ways but extrinsic evidence is not resorted to for the purpose of aiding in the construction, the proper construction of the contract is for the court, the proper construction of language in an insurance policy, to the effect that the insurer would not be liable for loss by "fires caused by the use of steam engines on the premises insured, other than threshing machine engines using coal for fuel, with sufficient wood to kindle or start the fire," was a question solely for the court. *Thurston v. Burnett & Beaver Dam F. M. F. Ins. Co.* 476

15. Such clause prohibited the use of wood, except to efficiently start combustion in the coal; the use of wood thereafter was within the excepted risk; and when wood was so used, up to a short time

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before the fire occurred, such fire was not caused by an engine "using coal for fuel with sufficient wood to kindle or start the fire," because coal was the last fuel put into the fire-box before the fire occurred. *Ibid.*

16. The evidence being to the effect that wood was used to make power for a considerable length of time, and then coal was put into the furnace as needed, and as a helper, for about fifteen minutes, which disappeared before the fire occurred, such fire was clearly within the excepted risk, and there was no question on the subject to be left to the jury. *Ibid.*

INTENT. See MUNICIPAL CORPORATIONS, 14.

INTEREST. See APPEAL, 18. TAXATION, 2. TAX TITLES, 1.

INTERSTATE COMITY. See COMITY. INJUNCTIONS, 1.

JOINDER.
Of causes of action. See LIBEL, 4. PLEADING, 15.
Of parties. See COSTS. MARRIED WOMEN, 2. PLEADING, 6. SALE OF CHATTELS, 5. TRUSTS AND TRUSTEES, 2.

JUDGMENT.

Several judgment against person sued as jointly liable: Verdict.

1. Under sec. 2885, R. S. 1878 (providing that when it appears on the trial of an action against several defendants sought to be charged as jointly, or jointly and severally, liable, that some were liable and others not, judgment may be rendered against either or any of the defendants found liable), a judgment may be rendered against one of several defendants sued as copartners, notwithstanding the entire failure of proof as to a partnership liability. *Little v. Staples,* 344

2. An error in such case in rendering a verdict in form against all the defendants and entering judgment against one defendant in accordance with the undisputed facts, did not affect substantial rights, and is therefore disregarded, under sec. 2829, R. S. 1878. *Ibid.*

In ejectment: Condition precedent. See NEW TRIAL, 1.

Reforming mortgage: Form. See MORTGAGES, 8.

Res adjudicata. See ESTATES OF DECEDENTS, 6. MASTER AND SERVANT, 21.

Collateral attack. See ESTATES OF DECEDENTS, 6, 7. JUSTICES' COURTS, 2.

3. Fraud in the procurement of a judgment does not affect the jurisdiction of the court rendering it, so as to render the judgment open to collateral attack. *Cody v. Cody,* 445

Correction. See ESTATES OF DECEDENTS, 3.

Restraining collection. See TOWNS, 1, 5.

Setting aside. See APPEAL, 2.

4. Equity will not interfere to set aside a judgment which is merely void or voidable but not unjust, but will leave the defendant to his remedy at law. *Purcell v. Kleaver,* 102

Reversal on appeal. See APPEAL, *Affirmance and reversal.*

Proof. See PARTNERSHIP, (1).

JUDICIAL NOTICE. See ATTORNEYS, 2.

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JURISDICTION.

See APPEAL, 5, 20. COURTS. INJUNCTIONS, 2. JUDGMENT, 8. SERVICE OF SUMMONS. TRUSTS AND TRUSTEES, 1. WILLS, 3–5.

Where the jurisdiction of a court is attacked directly, and there is no proof of the facts upon which the question of jurisdiction rests, no intendments in favor of jurisdiction can be indulged in except such as are supported by the record, if the record attempts to deal with that question. *Heminway v. Reynolds,* 501

JURORS. See CRIMINAL LAW, 1, 2.

JURY. See COURT AND JURY. INSTRUCTIONS TO JURY. VERDICT.

JUSTICES' COURTS.

1. Sec. 3781, R. S. 1878 (providing that "in actions against a garnishee, the person summoned to answer shall be entitled to receive the same fees for travel and attendance as a witness, and he shall not be bound to appear or answer unless his fees for travel and one day's attendance shall be first paid"), construed in connection with sec. 3778 (providing that "if any witness shall attend upon two or more cases in the same day before the same justice's court," he shall receive pay as in one case only), requires but one attendance fee and one traveling fee to be paid to a person to require him to appear and answer as a garnishee in several actions brought by the same plaintiff against him, returnable at the same time and place before the same justice. *Walsh v. Timlin,* 333
2. Where there is the office of justice of the peace in a municipal corporation, and a judgment rendered by a person purporting to act as such justice, in the absence of evidence to the contrary it will be presumed, in favor of such judgment, that the person so acting was in possession of the office, hence at least a *de facto* justice, and the judgment not open to collateral attack. *McCormick v. Cleveland,* 522

LACHES. See GARNISHMENT, 2.

LAND CONTRACT. See CONTEMPT. MORTGAGES, 1, 2. MUNICIPAL CORPORATIONS, 3, 4. PLEADING, 14. RECORDING ACTS. VENDOR AND PURCHASER, 1–4.

LANDLORD AND TENANT.

1. A lessor, upon default in the payment of rent, brought summary proceedings to recover possession of the premises. From a judgment awarding such possession to him the lessee appealed, and gave an undertaking, under sec. 3368, R. S., to stay proceedings during the pendency of the appeal, conditioned to pay rent during such pendency. *Held,* that the lessor did not, by accepting the rent secured by such undertaking, waive his right to insist on the forfeiture of the lease for nonpayment of previous rent. *Palmer v. City Livery Co.* 33
2. A general covenant in a lease to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent, except the covenant to renew. *Kollock v. Scribner,* 104
3. A general covenant to extend or renew a lease does not imply a continuation or renewal of the special covenant, because that would have the effect, by construction, to make the lease perpetual, or to

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call for renewals in perpetuity. Such interests in land are not favored in the law, and are not, therefore, upheld by construction or deduction from general language. *Ibid.*

4. The question of whether a covenant to extend a lease implies the making of a new lease, was settled in this state in *Orton v. Noonan*, 27 Wis. 272, in the affirmative, and *a fortiori* a covenant to renew must have the same effect. *Ibid.*

LIBEL.

1. In an action for the publication of an open letter which was libelous *per se*, the defendant may, under sec. 2678, R. S., set up both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the damages, including, in this case, a newspaper article published by the plaintiff two weeks earlier, to which the alleged libel professed to be a reply. *Candrian v. Miller*, 164

2. In an action for the publication of an article libelous *per se*, a refusal to instruct that any sum less than $50 would not be substantial damages because it would not carry costs, is *held* not to be erroneous, the question of damages being peculiarly for the jury. *Ibid.*

3. In such a case the plaintiff introduced letters written by the defendant for the avowed purpose of proving express malice. Before resting, however, his counsel stated that he desired "the record to show that we make no claim for punitory damages," and then offered another letter of the same general character. The evidence of malice was not formally withdrawn. *Held*, that the admission of evidence in mitigation of damages, against plaintiff's objection that no punitory damages were claimed, was not error. *Ibid.*

4. Where an article contains several libelous expressions, each of such expressions is in legal effect a separate cause of action. *Ibid.*

5. Under sec. 2678, R. S. (providing that "the defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances"), actual or compensatory damages cannot be reduced by mitigating circumstances. *Ibid.*

6. In an action for libel evidence of the plaintiff's bad character with reference to any of the defamatory charges is admissible under a general denial in mitigation of actual damages. *Ibid.*

LICENSE to foreign benefit association. See INSURANCE, 2.

LIENS.

Of mechanics, etc., for labor and materials. See ESTATES OF DECEDENTS, 1.

1. The plaintiff, as subcontractor, furnished glass for a building to the principal contractor, who used it in the building, but discovering that a portion of it was defective notified the plaintiff, who thereupon shipped new glass to replace that which was defective. Such new glass was received at the railroad depot agreed upon as the place for delivery, but was left there and never used in the building. The plaintiff gave to the owner of the building written

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notice of his claim for a lien within sixty days after the second shipment, but not until more than sixty days after the first glass was used in the building, and not until after such owner had settled with and paid the principal contractor. *Held*, that the right to a lien under sec. 3315, R. S., was lost by such delay in giving the required notice. *Brown & Haywood Co. v. Trane*, 1

2. The owners of a building entered into a written contract with A. to equip it with the necessary machinery for a flouring mill, every article to be furnished being expressly indicated. About two weeks after the contract had been completed and accepted in writing, and after the mill had been in operation about that length of time, the owners purchased new pulleys of A. for the purpose of increasing the power. Within six months from the date of the charge for said pulleys, but more than six months from the date of the last charge under the written contract, A. filed a claim for a lien against the premises for the purchase price of all the materials furnished. *Held*, that the pulleys were furnished under a separate contract, and the claim was therefore filed too late to preserve the lien for the materials furnished under the written contract. *Brown v. Edward P. Allis Co.* 120

3. A building was constructed and equipped as a macaroni factory and operated as such for about two weeks. The owners then put in flouring-mill machinery. In an action to determine the priority of various liens and mortgages on the premises, the admission of evidence that the owners had no intention of putting in the milling machinery until after the macaroni factory had been completed is *held* not to have been error. *Ibid.*

On logs and lumber.

4. In an action in the circuit court to enforce a statutory lien for work on logs, timber, and lumber, an undertaking on attachment, under sec. 5, ch. 139, Laws of 1891, is not required, unless ordered by the circuit court or judge on ten days' notice of the application therefor to the person who sued out the writ of attachment. *De Morris v. Wilbur Lumber Co.* 465

5. A person holding a lienable claim under the laws of this state, for work done on logs, timber, or lumber, may enforce collection of the entire claim out of any part of the property subject to such lien. *Ibid.*

6. Where a person, without notice, actual or constructive, of the existence of lienable claims on logs, timber, or lumber, under the statutes of this state, buys such property in the regular course of trade, pays full value therefor, transports the same at considerable expense for freight charges from the place of manufacture, and thereby enhances its market value, he is not, by reason of the facts, entitled to protection as a *bona fide* purchaser or otherwise, against the lien claim, because secs. 1, 4 of the lien law of 1891 provide that the lien claim shall take precedence of all claims, liens, or incumbrances created on, or sales made of, the property, either before or after the doing of the lienable work, and that no purchase of the property, within the time for filing the lien claim, shall prejudice the rights of the claimant. *Ibid.*

7. Actions to enforce liens for labor on logs and timber are actions at law. *Ibid.*

8. Under the provisions of the lien law, to the effect that for work done between the 1st day of November and the 1st day of May following, or commenced on a day prior to the 1st day of November

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and continued without interruption to a day between the 1st day of November and the 1st day of May following, the lien petition shall be filed on or before the 1st day of June next thereafter, and that for work commenced after the 1st day of May and terminated before the 1st day of November following, the lien petition shall be filed within thirty days after the doing of the last work, the filing of a lien petition on the 3d day of April for work done partly between the 1st day of May and the 1st day of November preceding, and partly thereafter, the whole work not being continuous from first to last, is too late to preserve the lien for work done prior to such 1st day of November. *Ibid.*

9. In an action to enforce a lien upon lumber, etc., under ch. 139, Laws of 1891, evidence that after plaintiff commenced to do the work in defendant's mill, for which the lien was claimed, the mill was in operation cutting lumber; that there were manufactured inch and two-inch hemlock lumber, chair stock, wagon tongues, and the like; and that this was the lumber upon which the lien was claimed, is *held* sufficient to sustain a finding that plaintiff's work was performed in manufacturing *logs* and *timber* into planks, etc. *Bernhardt v. Rice,* 578

10. The log-lien law (ch. 139, Laws of 1891) being an independent enactment and not a part of ch. 143, R. S. 1878, and specific provision having been made in it that claims for liens not represented by time orders can be assigned only to persons claiming a lien upon the same property, *it would seem* that a log lien is not assignable under sec. 3316, R. S. 1878, making a claim for lien under said ch. 143 (which originally covered the subject of log liens) assignable. *Ibid.*

11. An instrument, in form an assignment of a log-lien claim, by the terms of which the assignee was to collect the claim and out of the proceeds pay the expenses of collection, then pay certain of the assignor's debts, including a debt to the assignee, and turn over the balance to the assignor, did not amount to an assignment or transfer of the right to the lien so as to destroy the lien, but created certain express trusts in favor of the assignor, who remained the real owner of the claim, with power to control the same at all times. *Caldwell v. Lawrence,* 10 Wis. 331, and *Tewksbury v. Bronson,* 48 Wis. 581, distinguished. *Ibid.*

Of judgments: Enforcement. See RECEIVERS.

LIFE INSURANCE. See INSURANCE, 3–6.

LIMITATION OF ACTIONS.

See MUNICIPAL CORPORATIONS, 8. PLEADING, 11, 16. RAILROADS, 1, 2.

1. In an action on a promissory note given in 1881 in settlement of an account stated, it appeared, among other things, that between that time and 1894 defendant ran an open store account with plaintiff, payments being made from time to time in money and produce, frequently when he owed nothing; that the note was not mentioned during such time; that no specific application of such payments was made, but the defendant instructed the plaintiff to give him credit therefor and the latter credited them on his books; that in 1893 the plaintiff wrote the defendant for money without specifying for what the same was due; that the defendant supposed his account was paid, but nevertheless made a payment without applying the same; that on March 31, 1893, defendant

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made his last purchase of plaintiff and thereafter there remained a balance to his credit on the latter's books; that in 1894 defendant made a further payment without inquiring as to the condition of his account or making any application; that thereafter plaintiff applied such balance, including such last payment, to the payment of interest on the note. *Held*, that the note was taken out of the statutes of limitation by part payment. *Lyle v. Esser*, 234

2. Lands descended to a husband and wife as tenants in common. The wife died leaving as her heirs several children, some of whom were married women, to whom her interest descended subject to the husband's estate by the curtesy. The husband thereafter executed a warranty deed of the whole premises purporting to convey the whole title, and the grantee went into possession. In 1863 the husband died. *Held*, that the ten-years statute of limitation commenced to run against the heirs of the wife, not under disability, upon the death of the husband, and against the married women upon the enactment of ch. 29, Laws of 1872, removing the disability of coverture. An action by said heirs to recover possession of their interest in the premises, which was not commenced until 1892, was therefore barred. *Brown v. Baraboo*, 273

LOGS AND LUMBER.

See AGENCY. CONTEMPT. CONTRACTS. LIENS, 4–11.

1. In an action to recover a balance alleged to be due on a logging contract which provided for a scale to be made by a scaler to be agreed upon between the parties, a stipulation that the only question to be submitted to the jury should be as to the amount of logs put in under the contract eliminated from the case all other questions which would otherwise have been for the jury,—including the question whether the parties agreed upon a person whose scale was disputed as the scaler under the contract. *McCann v. Doherty*, 335

2. The evidence in such a case is *held* sufficient to sustain a finding of the jury that the quantity of logs banked under the contract exceeded the scale made at the time they were banked. *Ibid.*

3. The objection that the finding of the jury as to the quantity of logs put in under the contract was in excess of the amount claimed in the complaint cannot be raised for the first time in this court. *Ibid.*

LOST CORNERS. See BOUNDARIES.

LUMBER INSPECTORS. See AGENCY, 4.

MANDAMUS. See MUNICIPAL CORPORATIONS, 7.

MARRIAGE AND DIVORCE.

See PARENT AND CHILD. TRUSTS AND TRUSTEES.

1. Proof that a formal marriage had been solemnized in a foreign country, in a church, by a person assuming the office of priest or minister, raises the presumption that the marriage was in accordance with the laws of the country and valid, and, especially where followed by cohabitation, casts upon the person attacking its validity the burden of showing that the law required some further act or fact. *Lanctot v. State*, 136

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2. On a trial for adultery, where the prosecution sought to prove the identity of the defendant as one of the parties to a marriage, letters offered for that purpose and claimed to have been written by him to his alleged wife were privileged communications and incompetent; and where they contained matter bearing upon the question of identity their admission, against the objection of the defendant, was a material error. *Ibid.*

MARRIED WOMEN.

See LIMITATION OF ACTIONS, 2. VENDOR AND PURCHASER, 8.

1. A married woman who has no separate estate or property of any kind and is not engaged in any kind of business cannot make a binding contract to repay money loaned to her to enable her husband, or herself and husband, to go into business. *Gallagher v. Mjelde,* 509
2. Under sec. 2608, S. & B. Ann. Stats. (providing that "where a married woman is a party, her husband *must* be joined with her, except that, when the action concerns her separate property or business, . . . she may sue or be sued alone"), it was error, in a case not within the exception, to allow an action against husband and wife to be discontinued as against the husband only. *Ibid.*

MASTER AND SERVANT.

Contract of employment: Recovery quantum meruit: Pleading.

1. In an action to recover a balance alleged to be due for services rendered under an express contract to pay specified wages, plaintiff cannot — at least not without amending his complaint — recover the reasonable value of his services, or introduce evidence upon that question. *Pearson v. Switzer,* 397
2. On October 6 defendant hired plaintiff to take charge of his mill at C. at $60 per month. During November and December defendant moved his mill to G. On December 27 the parties settled for the work already done at the agreed price, and plaintiff was fully paid. On January 1, following, plaintiff at defendant's request went to work at G. and continued to work there until September of the year following. He kept defendant's books, but did not credit himself with the $60 per month after January 1, as he had done before. *Held,* that he was not entitled to recover under the express contract for work done after January 1. *Ibid.*

Injuries to servants: Negligence: Defective machinery: Assumption of risk, etc.

3. Evidence showing, among other things, that there were two elevator shafts, side by side, in a dimly lighted place in a manufacturing plant, which had nothing to prevent approach to them and were dangerous, one elevator going up while the other was coming down, and that an employee who was perfectly familiar with all the facts and with the danger of exposing himself within the shafts, on being requested to place the dinner pail of the man at the top upon the elevator undertook to do so and was injured by the descending elevator, is *held* to sustain a finding by the trial court that he had assumed the risk and was, as a matter of law, guilty of contributory negligence. *Powell v. Ashland I. & S. Co.* 35

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4. It is a general rule that, where unusual dangers are known to the employee and he voluntarily assumes them, if he is thereby injured he cannot recover, because of his contributory fault, even though the master, at the same time, is guilty of negligence which, without such assumption of risk, would have rendered him liable. *Ibid.*

5. In an action for personal injuries received by an employee in a saw mill whose arm had been caught in an unguarded endless chain on a conveyor, and drawn between the chain and the sprockets, crushing it and otherwise injuring him, a complaint alleging explicitly that the machine was dangerous, that it could have been guarded and protected with little expense so as to obviate the danger; that similar machines in other mills in that locality were so guarded; and that the mill in the neighborhood of the conveyor was not properly lighted so as to enable employees working there to avoid danger while in the discharge of their duties, is *held* sufficient to charge the defendant with actionable negligence which was the proximate cause of the injury. *Jensen v. Hudson Sawmill Co.* 73

6. A complaint in such a case alleging, among other things, that the plaintiff was a common laborer, inexperienced and unfamiliar with sawmill machinery and the dangers incident thereto; that the defendant improperly placed him at work in close proximity to the machine mentioned, without informing him of the dangers arising from the unguarded condition of the chain and sprockets of the conveyor; that plaintiff informed defendant, May 22, 1893, that his employment under such circumstances was dangerous, and that he would quit unless the defendant furnished him better light and guarded said chain and sprockets; that the defendant promised to comply with such demands; and that the plaintiff, relying thereon, remained in the employment, and received the injuries of which he complained on the 24th of the same month,—does not, as matter of law, show either contributory negligence or assumption by plaintiff of the risk of being injured in his employment in the manner stated. *Ibid.*

7. While plaintiff, a minor seventeen years of age, employed to run a lath saw, was attempting to remove with a stick, while the saw was in motion, sawdust which had accumulated in a narrow space between the saw and a spout constructed to carry away the refuse, the stick was caught by the saw, and he was injured. It appeared without dispute that plaintiff had worked two years at the same or a similar saw, and that he knew of the danger of the stick being caught upon the revolving saw, and knew that the sawdust could be removed in perfect safety by stopping the saw, as he was entitled to do and had frequently done. *Held*, as matter of law, that he assumed the risk. *Larson v. Knapp, Stout & Co. Company,* 178

8. Where there is both a safe and a dangerous way of doing work about a machine, a promise to repair so as to remove the danger will not relieve an operative from the consequences of assumption of the risk if he deliberately chooses the dangerous way. *Ibid.*

9. In an action for personal injuries received while stowing away sacks of bran in the hold of a vessel, the complaint—alleging in effect that at the time of the injury plaintiff was in the actual employment of defendant, in the performance of his duty at a place where it was necessary for him to be; that he notified his co-employees who were dumping the sacks into the hold to refrain

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from throwing down more sacks until he had piled up those already there; that it then became the duty of defendants and their employees not to throw down more sacks until notified so to do; and that the defendants, contrary to their duty and without warning, wrongfully and negligently ordered their dumpers to throw down several sacks into the hold, while the plaintiff, not knowing that sacks were to be thrown down without warning, was working directly beneath the hatchway, whereby plaintiff was injured — is *held* to be sufficient and not to show affirmatively that plaintiff was guilty of contributory negligence. *Lago v. Walsh*, 348

10. Evidence to the effect that there was a standing rule that dumpers should give warning to those in the hold before dumping down any sacks; that plaintiff had told the dumper not to throw down any more sacks; that one of the defendants passed by, and seeing trucks loaded with sacks standing there inquired the cause, and was told of plaintiff's direction; that such defendant then looked into the hold and said with an oath, "Dump them sacks, dump them down," and they were dumped accordingly, without warning, is *held* sufficient evidence to sustain a verdict finding negligence on the part of defendants. *Ibid.*

11. The fact that the plaintiff heard the defendant's order to dump the sacks, and nevertheless continued working where they would be liable to strike him, is *held* not to render him guilty of contributory negligence as matter of law, in view of his previous direction to the dumper and the rule not to dump without warning, and of the equivocal language employed by the defendant. *Ibid.*

12. An instruction that if the jury found the defendant intentionally ordered the dumper to dump instantly, without warning, when he had reason to think there might be men below in danger, such act constituted carelessness as a matter of law, and that plaintiff should recover unless they also found that he was guilty of contributory negligence, is *held* not to have been erroneous. *Ibid.*

13. Nor was it error to instruct the jury that, in passing upon the question whether plaintiff would have escaped had he exercised ordinary care, they should take into consideration all the circumstances of the case,— "get into his shoes, so far as may be, when you pass upon his conduct;" and that carelessness meant "lack of ordinary care: that is, lack of such care as the man of ordinary care would exercise under the particular circumstances of the case," especially where followed by an instruction that defendant's order to dump acted as a revocation of the plaintiff's previous order to stop dumping, and imposed upon the plaintiff the duty of exercising reasonable diligence to get out of the way of the sacks so dumped; and that they should find for the defendants unless plaintiff exercised such reasonable diligence. *Ibid.*

14. Testimony of a physician to the effect that the plaintiff's injured leg was more apt to suffer in the future from rheumatism than if it had not been injured was admissible to show the actual effect of the injury. *Ibid.*

15. An employer is not relieved from liability for negligence causing an injury to an employee by the fact that the negligence of a fellow-servant also contributed to the injury. *Ibid.*

16. Where an experienced mechanic is injured by the slipping of a ladder on the floor where he was using it, such ladder being one of the ordinary tools in use in and about the premises and selected

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by such mechanic on the occasion of such injury, it was error to instruct the jury that, as a matter of law, the master was negligent because of some defect in the ladder, which was open and obvious to any person paying reasonable attention thereto. *Borden v. Daisy Roller Mill Co.* 407

17. A servant is not ordinarily obliged to search for defects in instrumentalities furnished for his use; nevertheless, in the use of ordinary tools, he takes the risk of all defects therein which are open and obvious to a person of ordinary care, by reasonable attention to them as they are used. *Ibid.*

18. In an action against a dock company for injuries sustained by an employee, who was struck by coal knocked from a pocket by a bucket, alleged to have been defective, which was used to hoist coal out of vessels and convey it to various parts of the yard by means of a track on a trestle, the only evidence of a defect was that the bucket failed to right and latch itself on the two preceding trips, made within fifteen minutes prior to the accident. On both such occasions the hoister had succeeded in righting the bucket by means of the levers, but on the occasion in question he had failed to do so, and, concluding that it would clear the coal in the pockets, brought it back unlatched. After this the bucket latched itself automatically on every trip for an hour and a half. *Held*, that the negligence, if any, was that of the hoister, a fellow-servant of plaintiff, and not that of the defendant, the time between the discovery of the defect and the happening of the accident being too short to charge the latter with constructive notice. *Prybiski v. N. W. Coal R. Co.* 413

19. Failure of the employer in such case to provide a covering for the space beneath the course of the buckets is *held* not to have been negligence, where there was no evidence that such a covering was practicable and the undisputed evidence was to the effect that such coverings were not in use upon similar docks in that part of the country. *Ibid.*

20. The complaint stated that the defendant employed an incompetent servant to take charge of boilers and engines in its blast furnace, and that plaintiff was injured by a negligent act of such servant in the line of his duty. *Held:*

(1) That the mere allegation that the servant performed a particular act negligently, and plaintiff was thereby injured, failed to show that the alleged negligence of the master in employing the incompetent servant was the cause of the plaintiff's injury.

(2) That the employment of an incompetent servant does not render the master liable to a fellow-servant for an injury to him caused by some negligent act of such incompetent servant, unless the injury is the result of such incompetence. If the injury be the result of a mere act of negligence of the incompetent servant, it comes within the rule that the master is not liable to an employee for an injury caused by the negligence of a co-employee in the same business.

(3) That to render mere negligence incompetence, there must be something more than mere failure of duty as to a particular act. There must be actual incompetency to do the work properly, either for want of physical or mental ability, or want of that mental balance and self-control that enables one reasonably to bring into use, with an ordinary degree of success, his intelligence and experience. *Kliefoth v. N. W. Iron Co.* 495

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21. The decision on former appeals in an action for personal injuries that the plaintiff did not, as a matter of law, assume the risk of the accident, and that the evidence was sufficient to support a finding of the jury that the keeping of the saw upon which plaintiff was injured in its exposed condition was negligence which was the proximate cause of the injury, renders those matters *res adjudicatæ* on appeal from the judgment rendered on a new trial on which the evidence was substantially the same as before. *Darcey v. Farmers' Lumber Co.* 573

22. A special verdict is *held* sufficient to cover the issue as to plaintiff's assumption of risk, although the question submitted on that point made what plaintiff, not what a man of ordinary prudence and intelligence, ought reasonably to have foreseen under all the circumstances, the test as to assumption of risk, where, construed in the light of the charge of the court, the answer of the jury to such question was to the effect that the plaintiff, as a man of ordinary intelligence and prudence, in the exercise of ordinary care, ought not to have known, nor reasonably to have expected or foreseen, that he was liable to sustain such an injury while in the performance of his duties. *Ibid.*

23. A finding in a special verdict that a person of ordinary prudence and intelligence, engaged in the operation and management of defendant's mill, ought reasonably to have foreseen that an injury would be likely to occur to a person employed as plaintiff was by coming in contact with the exposed saw in question, is *held* not to be inconsistent with a finding that the plaintiff, as a man of ordinary prudence and intelligence, ought not reasonably to have expected or foreseen that an injury would be liable to occur to him while performing his duties in the mill by coming in contact with the saw. *Ibid.*

24. Incompetency of a sawyer may arise from mere lack of practice for several years as well as from never having operated a saw carriage at all. *Curran v. A. H. Stange Co.* 598

25. Plaintiff, after working one night in defendant's sawmill as carriage rider, informed the superintendent that the sawyer was incompetent. The next evening he went to work with the same sawyer in charge, in reliance, as he claimed, upon the superintendent's promise, made that morning, to get another sawyer, and was injured about two hours thereafter by reason of the unskilful manner in which the carriage was operated. *Held*, that under all the circumstances it was a question for the jury whether plaintiff had assumed the risk arising from the incompetency of the sawyer, either by continuing in the employment after the lapse of a reasonable time for the change of sawyers to be made as promised, or because the danger was so great and immediate that he was not justified in working at all on the second evening. *Ibid.*

26. All the facts and circumstances surrounding plaintiff at the time he commenced to work the second evening were admissible as explaining why he went to work and whether his act was reasonable; and the fact that, after having stated that he was still relying upon the superintendent's promise, he was permitted to elaborate such statement of his mental condition or conclusions in connection with his testimony as to the facts upon which they were based, is *held* not to have been prejudicial. *Ibid.*

27. Testimony of physicians who treated plaintiff for his injuries, based in part upon statements as to his pains and feelings, made by him for the purpose of medical treatment, is *held* admissible. *Ibid.*

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28. Testimony of a physician that, so far as he was able to know, he would say that plaintiff's injuries were permanent, was admissible. *Ibid.*

29. A complaint alleging that numerous injuries to plaintiff's head, back, and spine were received, and that "other serious injuries were done him," is *held* sufficient, in the absence of a motion to make more definite and certain, to warrant the admission of evidence that plaintiff's eyesight and hearing were impaired. *Ibid.*

30. Where there was little conflict in the evidence except concerning the promise to discharge the incompetent servant, upon which question the jury were properly instructed, a refusal to instruct that they were not bound to credit the testimony of the plaintiff, even in matters where he was not contradicted by any witness, is *held* not to have been error. *Ibid.*

31. The use of the word *ought* instead of *would* in a question of the special verdict as to whether the danger to plaintiff by reason of the incompetent sawyer was so great that a reasonably prudent man, under the circumstances, *ought* not to have subjected himself to it, was not an error prejudicial to defendant, where the charge of the court upon that question used the correct word, and defendant had requested the submission of a similar question in which the word *ought* was used. *Ibid.*

32. Where the only claim of contributory negligence was that plaintiff assumed the risk, and that issue was properly submitted and determined in the special verdict, failure to submit a general question as to whether plaintiff was guilty of contributory negligence was not error. *Ibid.*

MAXIMS.
Causa proxima et non remota spectatur, 647.
Caveat emptor, 8, 9.
Stare decisis, et non quieta movere, 111.

MEASURE OF DAMAGES. See DAMAGES. SALE OF CHATTELS, 4.

MECHANICS' LIENS. See LIENS, 1-3.

MINORS. See MASTER AND SERVANT, 7.

MISTAKE. See ESTATES OF DECEDENTS, 3. MORTGAGES, 7, 8.

MITIGATION of damages. See LIBEL.

MORTGAGES.

See APPEAL, 7, 18. CHATTEL MORTGAGES. HOMESTEADS, 1. SALE OF CHATTELS, 4, 5. WILLS, 6.

1. The actual and open possession of land by the vendee, under an unrecorded contract for its purchase, is constructive notice of his rights to one who, while he is so in possession, takes a mortgage of the land from the vendor, but it is not notice of the rights of one to whom the vendor has secretly assigned the contract. *First Nat. Bank v. Chafee,* 43

2. In the absence of actual notice, or knowledge of facts sufficient to put him upon inquiry leading thereto, that the vendor in a contract for the sale of land has assigned such contract by a secret parol assignment, one who takes from the vendor a mortgage of the land will be protected against the assignee of the contract, and the claims of the latter will be held subject and subordinate to such mortgage. *Ibid.*

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3. A complaint alleging that, as part of the consideration paid for mortgaged premises, the defendants, in the deed conveying the premises to them, expressly assumed and agreed to pay a portion of the mortgage debt, is *held* sufficient to charge the defendants with personal liability. Whether the defendants knew of and assented to that provision in the deed is a mere matter of proof, and therefore need not be pleaded. *Stites v. Thompson*, 329

4. A purchaser of mortgaged premises, who assumes and agrees to pay the mortgage debt as part of the consideration, is liable as a principal and not as a surety; and his liability may be enforced without foreclosure of the mortgage. *Palmeter v. Carey*, 63 Wis. 426, limited and explained. *Ibid.*

5. Secs. 3533, 3534, 3540, R. S. 1878, provide that the owner of lands sold on the foreclosure of a mortgage by advertisement may redeem therefrom, and that if redemption be not made the sale shall be completed by the making of a deed to the purchaser, his assigns or personal representatives, and also provide that if the owner fails to redeem, any subsequent mortgagee may do so and will thereby become entitled to a deed completing such sale. *Held*, that the *bona fide* holder of a mortgage, though given after the foreclosure sale, who redeems therefrom, is entitled to a deed to complete the sale, which deed will vest in the grantee all the title of the mortgagor at the time of the making of the first mortgage, and cut off all further claim under such first mortgage. *McLean v. Hoehle*, 359

6. Under sec. 3169, R. S. 1878 (providing that the sheriff or referee making a foreclosure sale "shall make, execute and deliver to the purchaser a deed of the premises sold . . . which deed, upon the confirmation of such sale, . . . shall be a bar to all claim, right or equity of redemption therein, of and against the parties to such action, their heirs," etc., and also against all persons claiming under them subsequent to the filing of the notice of *lis pendens*), a referee's deed to the purchaser, upon the confirmation of the sale, passed to him all the right, title, or interest of the mortgagee in and to the premises sold, including his interest in the premises arising under tax certificates held by him at the time of the sale. *Ames v. Storer*, 372

7. A mortgage, executed by a life tenant who was also vested with a power to mortgage the fee, which did not refer to the power and therefore covered only the life estate, may be reformed so as to cover the fee, where both parties thereto intended and agreed that the fee of the land and not the mere life estate should be mortgaged, and supposed that a mortgage in the usual form would be a valid mortgage of the fee under the power. *Lardner v. Williams*, 514

8. A judgment in such a case, based on findings authorizing a reformation, which foreclosed the mortgage and ordered a sale of the fee, in all respects as though the mortgage had been reformed, but contained no provision specifically reforming it, was substantially a judgment of reformation. *Ibid.*

MUNICIPAL CORPORATIONS.

See TOWNS.

Powers of officers: Mayor: President of council.

1. Under sec. 3, subch. III, of the charter of the city of La Crosse (ch. 162, Laws of 1887), and sec. 4, subch. II, of the same act, the mayor

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of the city can perform no official duty while absent from the city. Consequently the appointment of a board of police and fire commissioners by virtue of ch. 247, Laws of 1897, is void, if made by him while so absent. *State ex rel. Emberson v. Byrne,* 16

2. The president of the common council being authorized to execute all the powers and perform all the duties of the mayor during that official's absence from the city, the appointment by him of a board of police and fire commissioners, when acting mayor in such a case, was legal and valid. *Ibid.*

Commencement of term of officers. See OFFICERS.

Levy of taxes by common council. See TAX TITLES, 1.

Indebtedness: Constitutional limit: Contracts.

3. Unpaid instalments upon contracts for the purchase of park lands made pursuant to sec. 13, ch. 488, Laws of 1889, and sec. 8, ch. 179, Laws of 1891 (authorizing the city of Milwaukee to purchase lands for park purposes upon credit, and providing that "for that purpose the proper officers of said city may execute and deliver to the vendor of such land or property purchased, an instrument creating a lien thereon for such purchase money, without creating any corporate liabilities therefor, to secure the whole or any part of the price in instalments"), do not constitute corporate indebtedness within the meaning of sec. 3, art. XI, Const., restricting the power of cities to contract debts. PINNEY and NEWMAN, JJ., dissent. *Burnham v. Milwaukee,* 128

4. The provision of the laws under which such contracts were made, that no corporate liability should be created, has controlling effect over provisions in the contracts in effect promising to pay the deferred instalments. *Ibid.*

Special legislation amending charter: Constitutional law.

5. Ch. 288, Laws of 1897, authorizes the erection of garbage reducing works in cities of the first class and the issue of bonds in payment therefor, and provides that all such bonds issued shall be issued, used, and disposed of in accordance with the provisions of ch. 311, Laws of 1893. Sec. 2 of said ch. 311 provides that no bonds shall be issued under it unless authorized by a vote of three fourths of the common council. Ch. 380, Laws of 1897, amendatory of ch. 288, provides that the common council of any city of the first class, *during the year 1897,* may issue corporate bonds, not exceeding a certain amount, for the purpose of erecting garbage reducing works, providing such issue shall be authorized by a vote of the majority of the members of the common council elect. The city of Milwaukee was the only city of the first class in the state, and no other could possibly come into that class during the year 1897. *Held,* that said amendment was special legislation amending the charter of Milwaukee, and was therefore within the inhibition of subd. 9, sec. 31, art. IV, Const. *Burnham v. Milwaukee,* 128

Claims: Presentation for allowance: Appeal.

6. Under sec. 25, subch. VII, ch. 36, Laws of 1882 (providing that no action shall be maintained against the city of Madison until the claim on which it is based shall have been first presented to the common council for allowance; and that the determination of the council disallowing the claim shall be final and conclusive and a complete bar to any action founded thereon, otherwise than by appeal), failure to act on a claim for five months after its presentation constitutes, presumptively at least, a waiver of the right of

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the city to be exempt from an action on the claim instituted in the usual way. *Kraft v. Madison*, 252

7. Although the claimant in such case has a remedy by *mandamus* to compel the council to act on his claim, that remedy is not exclusive, since he might still be put to his appeal and the prosecution of his claim in the circuit court. He may therefore elect to bring his action in the usual way directly against the city. *Ibid.*

8. Where a city charter provides that no suit on any claim or demand shall be brought against the city until the claimant shall have presented the same to the common council for allowance; that in case of a disallowance thereof the claimant may proceed by appeal to the circuit court within twenty days thereafter; that failure to pass on the claim within sixty days after presentation shall be deemed a disallowance; that the disallowance of the claim shall be conclusive and a bar to any action in court founded thereon unless appealed from within the time provided by the charter; that no suit of any kind on any claim of any character shall be brought against the city, but that the claimant shall proceed to enforce his claim by filing the same with the city clerk for the action of the common council thereon, and appeal therefrom in case of final adverse action as provided by the charter; that failure of the common council to pass upon the claim within sixty days from the time of such filing may be taken by the claimant as a disallowance of his claim; and that the council shall not consider any claim till it shall first have been examined and reported on by the comptroller. *held:*

(1) That the words "presented to the common council for allowance" and "filed with the city clerk for the action of the common council thereon" are synonymous terms and not affected by the requirement that the comptroller shall examine and report on claims before the consideration thereof by the council.

(2) That when a claim is filed with the city clerk for the action of the common council thereon, it is in legal effect presented to such council for allowance.

(3) That the sixty-day period of delay, which operates for the purposes of an appeal as a disallowance of a claim, commences to run as soon as the same is presented to the common council for allowance by filing the same with its clerk for its action thereon.

(4) That the word "may," in the provision to the effect that sixty days' neglect to pass upon a claim *may* be taken as a disallowance for the purposes of an appeal, and the word "may," in the provision to the effect that upon the disallowance of a claim the claimant *may* appeal, must be construed in a sense exclusive, so that when the right of appeal is perfected it must be exercised within the twenty days provided by the charter, or the claimant will be forever barred from prosecuting his claim in any court. *Mason v. Ashland*, 540

Plats: Dedication of streets. See PLATS OF LAND, 2.

Injuries from defects in streets, sidewalks, etc.

9. Upon evidence showing among other things that, while plaintiff was walking in a snow storm which might well conceal a hummock of ice around a pump in the sidewalk, he slipped and fell thereon, his attention being for the moment diverted by being accosted by a friend, it is *held* that he was not guilty of contributory negligence, as a matter of law, in not seeing and avoiding such ice. *Kenyon v. Mondovi*, 50

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10. In an action against a city for personal injuries caused by a defect in a sidewalk, evidence that there was plainly visible in a very generally traveled sidewalk, at the place where the accident occurred, a hole large enough to admit a man's foot, and that it had existed there for about a year, is sufficient to sustain a verdict finding the city guilty of negligence. *Crites v. New Richmond*, 55

11. The mere fact that the plaintiff in an action for such injury had previous knowledge of such defect,—frequently saw it and considered it to be dangerous,—does not establish contributory negligence on his part, as a matter of law. Though he knew of it, he was not bound at all times, by day or night, when passing over such walk to bear the defect in mind; and if an injury occurred when his attention was momentarily diverted by other matters, the question of contributory negligence was one for the jury to decide upon all the facts. *Ibid.*

12. Plaintiff, in passing over a portion of a sidewalk in the defendant village which inclined twelve or fourteen inches in six feet, fell and was injured. It appeared that four slats had been nailed across said incline about fourteen inches apart, but that they had been covered up by snow which had accumulated on the walk; that sleet or mist during the night preceding, or early on the morning of, the accident, followed by a slight flurry of snow, had rendered the walk very slippery, but that it had not previously been in that condition; that ashes had been sprinkled on the walk before, but none had been sprinkled after, such slippery condition arose; that the accident happened about 9 o'clock in the morning; and that plaintiff had passed over the place in question a short time previous thereto, going in the opposite direction, and knew the slippery condition of the walk. *Held*, as matter of law, that no defect in the sidewalk was shown which would render the village liable for plaintiff's injury. *Cooper v. Waterloo*, 424

13. The provision of sec. 1339, R. S. 1878, as amended by ch. 236, Laws of 1897, limiting the time for service of notice of injuries caused by defects in highways and streets to "thirty days in the case of any county or town, and fifteen days in the case of any city or village," is not unconstitutional, either because the time prescribed is unreasonably short, or because a different limitation is prescribed in case of counties and towns from that prescribed in case of cities and villages. *Daniels v. Racine*, 649

Injury from explosion of firecracker in street: Riot.

14. A complaint alleging that plaintiff was injured, while driving along a street in the defendant city on the evening of the Fourth of July, by the explosion of a cannon cracker, or explosive article, or bomb, thrown and exploded by someone among a crowd of thirty or more people who were obstructing the sidewalk, and unlawfully and in a tumultuous manner engaged in exploding firecrackers, etc., which were dangerous unless handled with extreme care, but not alleging or containing anything to indicate that the crowd, or any three or more persons therein, had any common intent or purpose to injure the plaintiff or any other person by the explosion in question, does not state a cause of action against the city under sec. 938, S. & B. Ann. Stats., making cities liable for injuries done by mobs or riots. *Aron v. Wausau*, 592

MUTUAL INSURANCE COMPANIES. See INSURANCE, 3-6.

NAME of foreign corporation: Right to use. See INSURANCE, 1.

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NEGLIGENCE.

See MASTER AND SERVANT, 3–32. MUNICIPAL CORPORATIONS, 9–12. RAILROADS, 4–8. STREET RAILWAYS.

1. Unless the proof of contributory negligence is so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion, the question of such negligence must be determined by the jury. *Powell v. Ashland I. & S. Co.* 35
2. In all cases where the inference of contributory negligence or the absence of it is in doubt, giving the testimony the construction most favorable to the party charged therewith, the question is for the jury. In order to warrant a nonsuit, or an absolute direction to find for the defendant, on the ground of contributory negligence, the proof of such negligence must be clear and decisive, leaving no room for impartial and unbiased minds to arrive at any other conclusion. *Crites v. New Richmond,* 55
3. Though contributory negligence may appear on the plaintiff's own showing, in an action for personal injuries, so as to render proof of it by the defendant unnecessary, yet an instruction that the burden of proof thereof is upon the defendant is not misleading, when the court adds that such negligence cannot be presumed in the absence of facts showing it or circumstances from which the inference can properly be drawn. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEW TRIAL.

See APPEAL, 3.

1. Sec. 3087, S. & B. Ann. Stats. (providing in effect that in ejectment, when plaintiff is entitled to recover by reason of the invalidity of any tax deed under which defendant claims title, he shall be required, except in certain cases, as a condition precedent to judgment in his favor, to pay to the defendant "the amount for which such land was sold, and the costs of executing and recording such tax deed, and the amount paid by the defendant for taxes assessed upon such premises subsequent to said sale, with interest on *all such sums* at the rate of twenty-five per centum per annum from the time so paid until the date of the verdict," subject to setoff), shows a legislative intent to have the judgment conclude all further controversy as to any claim by such defendant on account of any of such taxes. The propriety of allowing a new trial for the purpose of permitting the defendant to set up other tax deeds, based upon certificates of sales for subsequent taxes, where such certificates were held by him at the time of the trial, is therefore questioned. *Cook v. McComb,* 526
2. A party is estopped to object to the granting of a new trial by accepting the costs imposed on the other party as a condition of granting it. *Ibid.*
3. In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear that the facts upon which reliance is placed were discovered after the trial. *Curran v. A. H. Stange Co.* 598
4. Evidence that an expert witness who had testified that he was a graduate of certain medical colleges was not a graduate of one of

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them would be merely impeaching evidence, and a refusal to grant a new trial on the ground that that fact was not discovered until after the former trial was therefore not error. *Ibid.*

NONSUIT. See NEGLIGENCE, 1, 2.

NOTICE.
Of appeal. See APPEAL, 7. ATTORNEYS, 2.
Of meeting of school board. See COMMON SCHOOLS.
Of claim for lien. See LIENS, 1.
Of defect in machinery. See MASTER AND SERVANT, 18.
Of rights in land. See MORTGAGES, 1.
Of injuries from defects in streets. See MUNICIPAL CORPORATIONS, 13.
Of making improvements. See TAX TITLES, 1.
Of lack of authority to make contract. See TOWNS, 4.
Of proceedings to have trust executed. See TRUSTS AND TRUSTEES, 1.
Of proving will. See WILLS, 3–5.

NUISANCE. See COURTS.

OFFICERS.

Commencement of term: Custom.

It being the uniform custom in this state for old officers to go out of, and newly elected officers to come into, office at noon of the day appointed by law for the term to commence, *held*, that such custom contravenes no statute and has the force of law. *State ex rel. Emberson v. Byrne*, 16

De facto officers. See JUSTICES' COURTS, 2.
Proof of official character. See PARTNERSHIP, (1).
Lumber inspectors. See AGENCY, 4.
County officers. See COUNTIES. DISTRICT ATTORNEY.
Mayor and president of council. See MUNICIPAL CORPORATIONS, 1, 2.
Police and fire commissioners. See MUNICIPAL CORPORATIONS, 1, 2.
Town officers. See TOWNS, 1, 3–5.
School officers. See COMMON SCHOOLS.

PARENT AND CHILD.

See WILLS, 2.

A decree of divorce, granted for cruel and inhuman treatment of the wife by the husband, awarded the care and custody of the children to the wife until the youngest became ten years of age, but made no provision for their support. When the youngest child reached that age the father applied to the mother to have the child come to live with him, but the mother refused to let him go, and the father thereupon told her that he would not pay for his keeping. Thereafter the father made frequent efforts to get the child to live with him, but the mother would not consent, and the child continued to reside with his mother until a short time before the death of his father, at which time the latter sent him away to school, where he remained until after his father's death. *Held*, that a promise on the part of the father to compensate the mother for her necessary expenses in maintaining the child after the father became entitled to his care and custody, would be implied from his acquiescence in such maintenance by her and his failure to compel the child to live with him. MARSHALL, J., dissents. *Zilley v. Dunwiddie*, 428

PARTIES. See APPEAL, 7. COSTS. COUNTIES. MARRIED WOMEN, 2. PLEADING, 6. SALE OF CHATTELS, 5. TOWNS, 1. TRUSTS AND TRUSTEES, 2.

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PARTNERSHIP.

See JUDGMENT, 1. PLEADING, 9. VOLUNTARY ASSIGNMENT, 4.

Where several persons who had been doing business as copartners, having a going mercantile business, formed a corporation, determined their respective interests in the partnership property, subscribed for stock in the corporation to the extent of such interests, conveyed the partnership property and business to the corporation, and respectively received therefor the stock subscribed, without making any special provision for the payment of the partnership debts, and thereafter continued the business in the same place, with the same property, but in the name of and for the corporation, and there is no evidence or circumstance to impeach the transaction for fraud, unless under sec. 2310, R. S. 1878, because of want of delivery, change and continued change of possession, of the things sold, the presumption of fraud arises, and thereafter some of the property was seized on executions issued on judgments against the partnership, the corporation replevied the same and the person making the seizure, in justification thereof, gave in evidence the executions but made no proof of his official character or of the existence of the judgments, other than by the production of such executions; *Held:*

(1) That proof of the existence of a valid judgment and of the official character of the person who made the seizure was essential to make out his defense, and that neither of such facts was established by the mere production of the execution.

(2) That a transfer of the property by the partners to the corporation, without in any way retaining any equity to have the partnership debts satisfied out of such property, left no remedy in that regard to the creditors, under the rule that the creditors of a partnership have no lien on, or equity in, partnership assets, independent of the equity of the partners.

(3) That the mere fact that the debts of the partnership were not provided for in the transaction, there being no proof that the members of the partnership were insolvent, was not sufficient to in any way impeach the *bona fides* of the transaction.

(4) That the statutory presumption of fraud was effectually rebutted by proof that a full consideration was paid for the property. *Densmore Commission Co. v. Shong*, . 380

PAYMENT. See BILLS AND NOTES, 1. LIMITATION OF ACTIONS, 1. SALE OF CHATTELS, 8.

PHYSICIANS AND SURGEONS. See EVIDENCE, 2, 3. MASTER AND SERVANT, 14, 27, 28. NEW TRIAL, 4.

PLACE OF TRIAL. See APPEAL, 1.

PLATS OF LAND.

See BOUNDARIES.

1. Upon a recorded plat a strip of land south of and adjoining a river was marked "reserved for private use." South of said strip was block 7, on the east side of which was Walnut street and on the west side Vine street. Upon the plat said streets extended only to the reserved strip, but in fact Vine street was used as a public street to the river. A deed of a portion of said reserved strip described the premises conveyed as bounded "on the east by Walnut

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street, on the south by block No. 7, on the west by Vine street, and on the north by the center of" the river. *Held*, that the grantee in such deed took title to the center of Vine street extended, subject to the public easement; and that a conveyance of all the remainder of said reserved strip included the west half of Vine street. *Brown v. Baraboo*, 273

2. On the north side of the river, the plat extended to the town line. North of said line was another plat in which Oak street was in direct line with Vine street. Water street ran east and west along the south side of blocks 1, 2, and 3, but the south line of the western portion of said street, through which Vine street would run if extended across the river, was not designated, there being no lots between Water street and the river at that place. Two streets entered the eastern portion of Water street from the south, and three entered the street from the north, one of the latter, the name of which was not designated, being in direct line with Vine and Oak streets. The plat stated that all streets were sixty-six feet wide. *Held*, that the recording of said plat and the public use of the unnamed street, and of Water street along said three blocks, for more than forty years, constituted a dedication of such streets to the public, notwithstanding a requirement that plats should "particularly describe and set forth all streets . . . giving names, width, courses, boundaries, and extent." *Ibid.*

PLEADING.

See APPEAL, 6, 12. BILLS AND NOTES, 1. CLOUD ON TITLE. ESTATES OF DECEDENTS, 7. INSURANCE, 13 (b). LIBEL, 1, 6. MASTER AND SERVANT, 1, 5, 6, 9, 20, 29. MORTGAGES, 3. TAX TITLES, 1, 3. TOWNS, 1. VOLUNTARY ASSIGNMENT, 1.

1. In an action by an executor to foreclose a mortgage given to his testator, a son of the latter was interpleaded as claiming to own the notes and mortgage. He answered claiming to own them by purchase from his father, but at the trial the proof showed that he was the owner by gift. A prior examination of the son, however, under sec. 4096, R. S., had shown the nature of his claim, so that plaintiff was not misled. *Held*, that there was no failure of proof on the part of the son, and no material variance, the substance of the issue being the ownership of the notes, and the means whereby the son became the owner being merely incidental. *McNally v. McAndrew*, 62

2. The only pleadings in actions under the Code are those prescribed thereby. It constitutes a complete system which preserves all the remedies, both at law and in equity, of the old system and with the rules of court, prescribes the methods of procedure and system of pleading by which the jurisdiction of the court is exercised and the remedies pursued. *Kollock v. Scribner*, 104

3. The system of pleading, consisting of complaint, demurrer, answer, and reply, meets the necessities of all parties, in all cases, and in all courts. The answer setting up new matter constituting a counterclaim, where a defendant seeks affirmative relief against a plaintiff, and the answer setting up facts entitling a defendant to such relief against his co-defendant as the court has jurisdiction to grant under sec. 2883, R. S., take the place of the cross bill of the old practice. The answer of a defendant, seeking relief of his co-defendant, is in the nature of a cross bill, but is an answer and a code pleading nevertheless. *Ibid.*

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4. A defendant seeking relief of a co-defendant must set up the facts entitling him thereto by answer, and therein claim such relief, and it is proper for the court to require him to serve such answer on the defendant affected thereby and to require the latter to plead to such answer by way of demurrer or reply. *Ibid.*

5. Where there is an answer by a defendant, setting up new matter entitling him to relief against a co-defendant, and claiming such relief, and the facts constituting the cause of action in that regard, independent of the principal action, would not entitle such defendant to any relief in equity, if the complaint fails for want of equity, or is dismissed, that carries with it the incidental issues between the co-defendants. *Ibid.*

6. A defect of parties plaintiff cannot be reached by a general demurrer to the complaint. *Beyer v. Crandon,* 306

7. In an action to recover a balance due for merchandise sold and delivered to the defendant, under an answer admitting the purchase and alleging payment, evidence that $500, paid to plaintiffs by defendant on account of another transaction before the merchandise was purchased, should be applied as payment on the merchandise, was inadmissible. The facts entitling defendant to such application should have been pleaded as a counterclaim. *Morgan v. Hayes,* 313

8. Allegations that defendants were copartners; that plaintiff had a running account with the firm; that he delivered to the firm a certificate for corporate stock, under an agreement that the dividends paid thereon should be collected and credited to him on such account; that several dividends were collected, the amount of each being specified; and that defendants thereafter refused to credit the same as agreed, or to account therefor, are *held* sufficient to state a cause of action for breach of the agreement. *Little v. Staples,* 344

9. Under sec. 4197, R. S. 1878, where the complaint expressly alleged that the defendants were copartners, a general denial did not put in issue the question of partnership. *Lago v. Walsh,* 348

10. In an action to recover instalments of rent, the verification of the complaint by an agent showed that the deponent had acted as agent for the plaintiff in collecting rents for several years, and had collected a considerable amount thereof, and that his belief as to the allegations made upon information and belief was founded upon transactions wherein he was plaintiff's agent. *Held,* that this sufficiently set forth the agent's knowledge and the grounds of his belief, under sec. 2666, R. S. 1878. *Roosevelt v. Ulmer,* 356

11. The admission of service indorsed upon the back of a summons and complaint cannot be considered in passing upon a demurrer based upon the statutes of limitation, since, under sec. 2649, R. S. 1878, a demurrer reaches only such defects as appear upon the face of the complaint. *Anderson v. Douglas Co.* 393

12. The objection that the plaintiff has an adequate remedy at law cannot be raised by a demurrer *ore tenus* to the complaint. *Bigelow v. Washburn,* 553

13. In pleading fraud it is not sufficient to allege the mere conclusion that the party acted fraudulently, but the facts from which such conclusion is drawn must be stated. *Crowley v. Hicks,* 566

14. In an action to compel a conveyance of land which plaintiff claimed to have bought at auction sales, an allegation in the complaint

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that when the land was first put up at auction by defendants the plaintiff was the highest and best bidder, and that "memoranda of the bids and sale were duly made and kept by the parties," is *held* insufficient to show a compliance with the statute of frauds (sec. 2304, R. S. 1878), where the complaint does not state that a sale was then in fact made, but alleges two subsequent auction sales of the same land by the defendants, at each of which, also, the plaintiff was the highest and best bidder, and does not show upon which sale he relies. *Ibid.*

15. A cause of action against executors in their representative capacity cannot be joined with a cause of action against them as individuals. *Ibid.*

16. A demurrer on the ground that the action was not commenced within the time limited by law will not be considered if it fails to refer to the statute relied on, as required by sec. 2651, R. S. 1878. *Ibid.*

POWERS.

See MORTGAGES, 7, 8. WILLS, 6.

The common-law rule that where a person has both an interest and a power, a conveyance by him which contains no apt words indicating an intent to exercise the power will be held to be merely a conveyance of the interest, and not an execution of the power, was not changed by sec. 2149, R. S. 1878, providing that "every instrument executed by the grantee of a power, conveying an estate or creating a charge, which such grantee is authorized by the power to convey or create, but which he would have no right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein." *Lardner v. Williams*, 514

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PRINCIPAL AND AGENT. See AGENCY.

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PUBLIC SCHOOLS. See COMMON SCHOOLS.
PUBLICATION of summons, etc. See SERVICE OF SUMMONS.
PUBLICATION of notice. See WILLS, 4, 5.
PUNITORY DAMAGES. See LIBEL, 3.
QUIA TIMET. See CLOUD ON TITLE.

RAILROADS.

Taking of land: Proceeding to recover compensation: Limitations.

1. A proceeding by remaindermen to recover compensation under sec. 1852, R. S. 1878, for the taking of land by a railroad company is an action for an injury to the inheritance within the meaning of sec. 2198, providing that remaindermen may maintain such an action notwithstanding any intervening estate for life or years. The running of the statute of limitations is, therefore, not suspended during the intervening estate. *Hooe v. C., M. & St. P. R. Co.* 302

2. Such a proceeding by remaindermen must be commenced within six years after the right of action accrues, or it will be barred under subd. 5, sec. 4222, R. S. 1878, limiting the time within which actions to recover for injuries to real property must be brought. *Ibid.*

3. By commencing proceedings under sec. 1852, R. S. 1878, for the taking of land by a railroad company, remaindermen elected to take the compensation provided for therein, and thereby waived all remedies they otherwise might have had for the recovery of the land itself. *Ibid.*

Fires negligently set: Fences. See RAILROADS, 7.

4. A fire started by defendant's negligence, after spreading one mile and a quarter to the northeast, near plaintiffs' property, met a fire having no responsible origin, coming from the northwest. After the union, fire swept on from the northwest to and into plaintiffs' property, causing its destruction. Either fire, if the other had not existed, would have reached the property and caused its destruction at the same time. *Held:*
   (1) That the rule of liability in case of joint wrongdoers does not apply.
   (2) That the independent fire from the northwest became a superseding cause, so that the destruction of the property could not, with reasonable certainty, be attributed in whole or in part to the fire having a responsible origin: that the chain of responsible causation was so broken by the fire from the northwest that the negligent fire, if it reached the property at all, was a remote and not the proximate cause of the loss. *Cook v. M., St. P. & S. S. M. R. Co.* 624

5. After the fire swept everything of a combustible character clean, on both sides of defendant's right of way, plaintiffs' horses, that were running at large, went upon the railway track and were killed by a passing train without negligence on the part of the train men. The right of way had never been fenced as required by law. *Held:*
   (1) That the rule of absolute liability, under the statute requiring railway companies to fence their tracks, applies only where the loss is produced, in whole or in part, by reason of the failure to fence.
   (2) That in the circumstances stated the chain of causation

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reaching from the failure to fence was broken by the fire that would unquestionably have destroyed the fence if it had existed, so that the failure to fence cannot be said to have contributed to the entry of the horses upon the railway track. *Ibid.*

Collisions at highway crossings.

6. In an action against a railway company to recover for the killing of a team in a collision at a highway crossing in the country, where no statute or ordinance regulated the rate of speed, negligence cannot be inferred from the mere fact that the train was running about forty miles per hour. *Sutton v. C., St. P., M. & O. R. Co.* 157

7. The failure of a railroad company to properly fence its right of way cannot be the basis of a recovery for the killing of a team at a highway crossing, where there is no evidence tending to show that the fence or its absence had anything to do with the accident. *Ibid.*

8. In order to charge a railroad company with negligence by reason of an open ditch in the highway at a crossing, on the ground that the company had failed to restore the crossing to its former condition of usefulness as required by sec. 1836, R. S., it must appear that the ditch was caused by the failure of the company to comply with the statute. *Ibid.*

9. The existence of a highway when a railroad was constructed, so as to render it the duty of the company to restore the highway to its former condition of usefulness, under sec. 1836, R. S., is *held* to have been established, *prima facie*, by the evidence of witnesses that they were acquainted with the highway at the point in question before the railroad was built and that it was traveled at that time; and introduction of the records of the laying out of the highway was unnecessary. *Ibid.*

10. Evidence of witnesses who were not listening for locomotive signals at a highway crossing, and did not have their attention directed to the subject, that they did not hear the whistle blown at the proper distance from the crossing, but did hear it blown at a much less distance, is *held* insufficient to support a verdict to the effect that proper signals were not given. *Ibid.*

Street railways. See STREET RAILWAYS.

RAPE. See CRIMINAL LAW, 7.

REAL PROPERTY. See BOUNDARIES. CLOUD ON TITLE. ESTATES OF DECEDENTS, 4, 5. FRAUDULENT CONVEYANCES. HIGHWAYS, 2. HOMESTEADS. LANDLORD AND TENANT. LIMITATION OF ACTIONS, 2. MORTGAGES. MUNICIPAL CORPORATIONS, 3, 4. NEW TRIAL, 1. PLATS OF LAND. PLEADING, 14. POWERS. RAILROADS, 1–3. RECEIVERS. RECORDING ACTS. TAX TITLES. TRUSTS AND TRUSTEES. VENDOR AND PURCHASER. WATERS. WILLS, 6.

RECEIVERS.

See CORPORATIONS.

The court which had appointed a receiver for a corporation rendered judgment for the plaintiffs in an action to subject lands in the hands of the receiver to the lien of plaintiffs' executions against the grantor of the corporation. The judgment directed that the sheriff proceed upon said executions to sell the lands. *Held*, that

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this direction was within the power of the court and will not be disturbed in the absence of anything to show that such method of enforcing the lien was prejudicial. *Cass v. Sutherland*, 551

RECORD. See APPEAL, 20. ESTATES OF DECEDENTS, 3. JURISDICTION.

RECORDED PLATS. See PLATS OF LAND.

RECORDING ACTS.

A mere executory contract for the sale of land is not a "conveyance," within the meaning of secs. 2241, 2242, R. S., nor is the vendee a "purchaser" within the meaning of those sections, which make an unrecorded conveyance void as against a subsequent purchaser in good faith whose conveyance shall first be recorded. *First Nat. Bank v. Chafee*, 42

REDEMPTION. See MORTGAGES, 5.

REFERENCE *held* proper in a case where the trial necessarily required the examination of a long account. *Lyle v. Esser*, 234

REFORMATION. See MORTGAGES, 7, 8.

REGISTRY OF DEEDS. See RECORDING ACTS.

REMAINDERMEN. See ESTATES OF DECEDENTS, 3. RAILROADS, 1.

RES ADJUDICATA. See ESTATES OF DECEDENTS, 6. MASTER AND SERVANT, 21.

RESCISSION. See SALE OF CHATTELS, 6–8. VENDOR AND PURCHASER, 5–8.

REVERSAL. See APPEAL, *Affirmance and reversal.*

RIOT.

See MUNICIPAL CORPORATIONS, 14.

In order to constitute an unlawful assembly or riot under sec. 4511, R. S. 1878, the three or more persons engaged therein must have a common purpose to do the act complained of. *Aron v. Wausau*, 592

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 9–13. PLATS OF LAND. RAILROADS, 6–10. TOWNS, 2–5.

SALARIES. See COUNTIES. DISTRICT ATTORNEY.

RULES OF COURT.
Supreme Court Rule IX (Briefs), 417, 418.
Supreme Court Rule XXXII (Reversal for excess), 525, 526.

SALE OF CHATTELS.

See AGENCY. LOGS AND LUMBER.

1. The rule of *caveat emptor* has no application where a purchase is induced by fraudulent representations on the part of the seller. *Beetle v. Anderson*, 5

2. An error in instructing the jury, in a case where a purchase was induced by fraudulent representations, that the rule of *caveat emptor* applies, is not cured by a further instruction that a purchaser has a right to rely upon representations made by the seller as to matters within the knowledge of the seller but not known to the purchaser. *Ibid.*

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8. In a case where an agent, acting for the purchasers, received representations from the seller as to the value of the property included in the mortgage proposed to be purchased by him, and the financial standing of the indorsers of the notes secured thereby, which were false, and which being reported by him to the plaintiffs induced them to purchase such mortgage, an instruction that if such agent was not appointed the agent of the defendant his representations to the plaintiffs would not bind him, and, if he was such agent, the defendant would not be bound thereby unless the agent made them with knowledge that they were false, or made them with defendant's knowledge and the defendant knew them to be false or had no reason to believe them to be true, is erroneous, because the seller is responsible in such a case for the representations made by him to the plaintiffs' agent, even though the latter may, for some purposes, represent the seller also. *Ibid.*

4. The measure of damages recoverable by one who was induced to purchase a mortgage by fraudulent representations as to the value of the mortgaged property and the responsibility of the indorsers of the notes secured thereby, is a sum equal to that portion of the mortgage debt which the securities, when properly applied, will fail to pay, when, if they had been as represented, they would have been adequate to pay the whole debt. *Ibid.*

5. Where several persons, induced by false representations, purchased a mortgage, each contributing one fourth of the money, *held*, that their interests in the securities were joint, and they might properly sue jointly for the fraud. *Ibid.*

6. Although a vendor of chattels must ordinarily return or offer to return the consideration received, so as to put the buyer *in statu quo*, before he can rescind the sale on the ground of fraud, the rule requiring such restoration is, nevertheless, equitable in its nature, and does not require the doing of unreasonable or impossible things, which do not tend to secure equity in the particular transaction. *Friend Bros. Clothing Co. v. Hulbert,* 183

7. Where sales are made upon credit at different times through a period of several months, each sale will be treated as a separate and distinct transaction, for the purpose of the rule requiring a return of the consideration received as a condition of rescinding the sale. *Ibid.*

8. Where the payments made by the purchaser in such a case did not exceed the amount of the first sale, each payment should be applied upon that purchase, unless at the time it was made it was specifically applied by the purchaser upon some other purchase. *Ibid.*

SALE OF LAND. See PLEADING, 14. VENDOR AND PURCHASER.

SALES for taxes. See TAX TITLES.

SCHOOLS. See COMMON SCHOOLS.

SEALS. See VOLUNTARY ASSIGNMENT, 3.

SERVICE OF SUMMONS.

See PLEADING, 11.

1. The provision of sec. 2640, R. S. 1878, that the facts required to exist in order to authorize service by publication must appear in the complaint and affidavit for publication taken together, is a jurisdictional requirement and must be strictly complied with. *Roosevelt v. Ulmer,* 356

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2. The provisions of sec. 2640, R. S. 1878, that the order for publication "shall direct that the service of the summons be made by its publication in a newspaper . . . not less than once a week for six weeks, and that on or before the day of the first publication" a copy be deposited in the post office, etc.; and that "the first publication must be made within three months from the date of such order," are not sufficiently complied with by an order requiring the first publication be made "three months *from* the date" thereof, and that "on or about the date of the first publication" the summons be mailed. *Ibid.*

SIDEWALKS. See MUNICIPAL CORPORATIONS, 9–12.

SPECIAL VERDICT. See MASTER AND SERVANT, 22, 23, 31, 32. VERDICT.

SPECIFIC PERFORMANCE. See VENDOR AND PURCHASER, 1–4.

STATE VETERINARIAN.

The destruction of valuable cattle, free from any disease, by the state veterinarian under color of ch. 467, Laws of 1885, as amended by ch. 76, Laws of 1887 (authorizing the destruction of animals in case they are affected with some "contagious or infectious disease of malignant or very fatal nature"), is unlawful and tortious. *Houston v. State,* 481

STATUTE OF FRAUDS. See CHATTEL MORTGAGES. PLEADING, 14.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

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STREET RAILWAYS.

1. In an action for personal injuries received in a collision between an electric street car and the wagon in which plaintiff was driving, where the undisputed evidence showed that neither the car nor the wagon was injured or showed any evidence of the collision, and that after the collision the car was stopped as soon as would have been practicable had it been going at an ordinary rate of speed, plaintiff's testimony that the car was going at a speed of twenty miles per hour is *held* to be incredible and insufficient, of itself, to warrant a jury in finding that the car was going at a negligent rate of speed. *Flaherty v. Harrison*, 559

2. The complaint in such case alleged that the motorman was negligent in that he ran into the wagon without giving any signal of the approach of the car by sounding the bell. The evidence showed that he sounded the bell constantly while passing over a distance of about 100 feet in approaching the crossing at which the collision occurred; that plaintiff saw the car approaching when his horses' heads were just over the track, and immediately backed them clear of the track and stopped, with them completely under control; that when the car was close at hand the horses became

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frightened by the bell and the noise and appearance of the car, and jumped forward bringing the wagon in front of the car. There was no evidence that the horses showed symptoms of fright till the instant they jumped in front of the car. *Held*, that there was no warrant for submitting the case to the jury on the claim that there was a negligent ringing of the car bell which caused the horses to become frightened and unmanageable. *Ibid.*

3. Actionable negligence on the part of the motorman in such a case is not shown unless it is a reasonable inference from the evidence and circumstances established thereby that the jumping forward of the horses was a natural and probable result of his conduct, and that, as a person of ordinary intelligence and prudence, in the light of attending circumstances, he ought reasonably to have anticipated such result, or some injury to plaintiff, by reason of such conduct. *Ibid.*

STREETS. See MUNICIPAL CORPORATIONS, 9–13. PLATS OF LAND.

SUBCONTRACTORS. See LIENS, 1.

SUICIDE. See INSURANCE, 3, 4, 6.

SUMMONS. See SERVICE OF SUMMONS.

SUPREME COURT. See APPEAL. COURTS.

SURFACE WATER. See WATERS.

SURRENDER of gift. See GIFTS.

TAXATION.

See TAX TITLES. TOWNS, 3.

1. Where, pending an action in equity to set aside alleged illegal taxes and restrain a levy upon personal property to collect the same, the defendant town made such levy and the plaintiff was obliged to pay the entire amount of the tax to prevent a sale, *it would seem* that the action should not be dismissed on the ground that the plaintiff has an adequate remedy at law, but the court should retain jurisdiction and grant such relief as the changed conditions demand. *Bigelow v. Washburn*, 553

2. The levy by a town board of a tax to pay interest on outstanding orders is *held* to have been without authority, in the absence of anything to show that they had ever been presented, or that the holders were threatening suit thereon. *Ibid.*

3. In the absence of evidence to the contrary it will be presumed that outstanding orders and bills allowed by a town board of supervisors were for legal obligations, and that it would not be inequitable for the town to pay them. *Ibid.*

4. At a special town meeting held July 17 it was voted to levy a tax for highway purposes for that year. The town had theretofore voted to collect the highway taxes in money. *Held*, that such tax was properly computed on the basis of the valuation of the preceding year. *Ibid.*

TAXATION of costs. See APPEAL, 17–19. COSTS.

TAX TITLES.

See MORTGAGES, 6. NEW TRIAL, 1.

1. In an action to restrain the issuance of a tax deed, to set aside the tax sales, and for a reassessment, allegations that the common

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council of Superior levied upon the taxable property of the city a certain amount for the "general fund," without further explanation; that the county treasurer added an excessive amount of interest; and that the requisite notices for making certain improvements for which the property was assessed were not given, are *held* not to state a cause of action, since the matters alleged do not affect the groundwork of the tax. *Anderson v. Douglas Co.* 393

2. The intentional assessment of vacant lands for a much greater amount in proportion to their value than improved lands, for the purpose of encouraging improvements, to the great injury of the owner of such vacant lands, is a defect going to the validity of the assessment and affecting the groundwork of the tax, such as authorizes the interference of a court of equity. *Ibid.*

3. In an action to restrain the issuance of a tax deed based on such an assessment, payment or tender of the amount justly chargeable to the plaintiff's lands need not be alleged, since it is impossible to ascertain, by computation or otherwise, the amount so justly chargeable; nor need the plaintiff allege a willingness to pay, an allegation of such mere mental condition, incapable of disproof, being of no benefit to defendant. *Ibid.*

TEACHERS. See COMMON SCHOOLS, 2.

TENANTS in common. See LIMITATION OF ACTIONS, 2.

TENDER. See TAX TITLES, 3.

TERM of office. See OFFICERS.

TITLE to land. See CLOUD ON TITLE. ESTATES OF DECEDENTS, 4, 5. FRAUDULENT CONVEYANCES. HIGHWAYS, 2. HOMESTEADS. LIMITATION OF ACTIONS, 2. MORTGAGES. MUNICIPAL CORPORATIONS, 3, 4. NEW TRIAL, 1. PLATS OF LAND. PLEADING, 14. POWERS. RAILROADS, 1–3. RECEIVERS. RECORDING ACTS. TAX TITLES. TRUSTS AND TRUSTEES. VENDOR AND PURCHASER. WILLS, 6.

TOWN ORDERS. See TAXATION, 2, 3.

TOWNS.

See HIGHWAYS. TAXATION, 1–4.

1. In an action by taxpayers of a town to restrain the collection of a judgment against the town on the ground that it was fraudulent and illegal, allegations of the complaint that the town officers, at the time of the commencement of the action, were in collusion with the owner of the alleged fraudulent claim to enforce its payment out of moneys raised by taxation and had caused a similar action instituted in its name to be discontinued, are *held* to state the existence of conditions rendering ineffectual, and therefore unnecessary, a demand upon the proper town officers to bring the action. *Beyer v. Crandon,* 306

2. A contract with a town for work upon a highway having no legal existence is illegal. *Ibid.*

3. A contract with a town for work upon a highway, which expressly provided that the work should be paid for out of a tax to be levied the next year, after the term of office of the supervisors would have expired, there being no money in the treasury applicable to the work or taxes levied or about to be levied therefor, is illegal and void. *Ibid.*

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4. Where officers of a town contract in excess of their power, no liability against the town is thereby created, legal or equitable, from the mere fact that the other party to the contract has performed and the town has had the benefit of the work, the contractor being chargeable with knowledge that no authority existed for creating a debt against the town for work under the contract. *Ibid.*

5. In an action to restrain the collection of a judgment against a town, founded on an illegal contract, evidence that the proper town officers knew the foundation of the claim when the suit to recover therefor was brought, and not only failed to defend but advised its being put into judgment, is *held* sufficient to establish collusion and fraud. *Ibid.*

TRANSACTIONS with person since deceased. See EVIDENCE, 4.

TRIAL. See ATTACHMENT, 3, 4. ATTORNEYS, 1. COSTS. COURT AND JURY. CRIMINAL LAW. EVIDENCE. INSTRUCTIONS TO JURY. JUDGMENT. JUSTICES' COURTS. LOGS AND LUMBER, 1. NEGLIGENCE. NEW TRIAL. REFERENCE. VERDICT.

TRIAL, Place of. See APPEAL, 1.

TRUSTS AND TRUSTEES.

See COUNTIES. ESTATES OF DECEDENTS, 1, 2. LIENS, 11.

1. By the judgment in a divorce action title to the real estate of the husband was vested in a guardian *ad litem* charged with a trust duty or power in trust for the husband, to be executed as directed by the county court of Dodge county. By sec. 2465, R. S. 1878, as amended by sec. 1, ch. 31, Laws of 1879, that court is given powers and jurisdiction in all civil actions and proceedings (with certain exceptions not necessary to be considered) concurrent with and equal to the jurisdiction of the circuit court. *Held*, that as a court of general equity jurisdiction the county court of Dodge county had jurisdiction, not limited by county lines, over the execution of the trust. *Cody v. Cody*, 445

2. Neither the children of the *cestui que trust* nor the divorced wife, who had been awarded a sum of money as permanent alimony and in lieu of dower, had any interest in the property which gave them a legal right to notice of the proceedings to have the trust executed. *Ibid.*

UNDERTAKING on attachment. See LIENS, 4.

UNLAWFUL ASSEMBLY. See RIOT.

USAGE. See OFFICERS.

VARIANCE. See JUDGMENT, 2. PLEADING, 1. STREET RAILWAYS, 2.

VENDOR AND PURCHASER OF LAND.

See CONTEMPT. MORTGAGES, 1, 2. MUNICIPAL CORPORATIONS, 3, 4. PLATS OF LAND, 1. PLEADING, 14. RECORDING ACTS.

1. Under a verbal contract by which defendant agreed to buy a certain eighty-acre tract of land and sell it to the plaintiff on the same terms as he purchased it, and to execute to her a land contract therefor, and to apply on the price thereof the amount he might receive for a forty-acre tract which the plaintiff deeded to him, less certain indebtedness of plaintiff to him, possession of the eighty-acre tract was delivered to the plaintiff pursuant to the contract, but the defendant afterwards sold the forty-acre tract

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for $1,100 and refused to account therefor, and also leased the eighty-acre tract to the plaintiff's husband without her knowledge, and refused to make to her the land contract as agreed. *Held*, that the plaintiff was entitled to an accounting and to specific performance of the contract. *Hege v. Thorsgaard*, 11

2. In such action, where it appeared that the defendant had in fact executed a long lease of the forty-acre tract, giving the lessee an option to purchase, and that he admitted that he was chargeable with $1,100, an error in finding that he had sold the land for $1,100 is held to be harmless. *Ibid.*

3. Evidence in such action that the entire consideration for the purchase of the eighty-acre tract was to be paid from the proceeds of the plaintiff wife's separate estate, and her positive testimony that the contract was to be made to her, is *held* to justify a finding that the contract was to be made to her, and not to her husband, though she sometimes used the term "we" in testifying of it. *Ibid.*

4. A refusal to enforce specific performance of an oral agreement between the managing officer of a railway company and the managing officer of a land company, whereby the railway company was to extend its road to a town site of the land company, and the latter was to give it the necessary ground for right-of-way and depot purposes, is *held* not to have been an abuse of discretion, where the making of the agreement was denied by the representative of the land company, and it did not appear that either officer had authority to bind his respective corporation by such an agreement, or that the agreement was ever ratified by either corporation with knowledge of its terms. *Dewey v. Spring Valley Land Co.* 83

5. The purchaser of a farm, having commenced an action to rescind the contract of sale, refused to take possession of the property when it was tendered to him during the months of March and April. Thereupon the vendor, who was a nonresident, for the protection of both parties, let the farm for the season, under an agreement for a fair division of the crops with the person ultimately found entitled thereto. Before the lease expired the action for rescission was decided against the purchaser, and he immediately demanded possession. *Held*, that the vendor's inability to deliver possession at that time because of the lease did not authorize a rescission, since the purchaser by his own acts had helped to bring about the existing state of affairs. *Garbes v. Roberts*, 173

6. In an action to recover back the purchase price of the farm on the ground of such failure to deliver possession, the vendor set up a counterclaim for taxes paid by him, which the purchaser had agreed to pay. *Held*, that a judgment offsetting such taxes against the crops was erroneous, the crops being in no sense before the court. *Ibid.*

7. Where the vendor under a land contract voluntarily pays taxes which the purchaser had agreed to pay, before the same became delinquent, he cannot recover the amount paid from the latter. *Ibid.*

8. In an action by an aged person to rescind a conveyance of land made to his son in consideration of an agreement to pay a certain annuity and to furnish living rooms and provisions for himself and wife during their lives, findings of the trial court that there had been a substantial breach of the agreement on the part of the defendant, entitling the plaintiff to the relief asked, are *held* to be sustained by the evidence. *Reoch v. Reoch*, 201

VENUE, Change of. See APPEAL, 1.

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VERDICT.

See JUDGMENT, 2. MASTER AND SERVANT, 22, 23, 31, 32.

1. It is not error to refuse to submit questions for a special verdict offered by a party, if those submitted fully cover all the issues in the case. *Kenyon v. Mondovi*, 50

2. Failure to submit for special verdict questions proposed by the appellant is not error, where such questions are all covered, though in a different form, by the questions actually submitted, and such last-named questions are not objectionable. *Raymond v. Keseberg*, 317

VERIFICATION by agent. See PLEADING, 10.

VESTED RIGHTS. See VOLUNTARY ASSIGNMENT, 7.

VETERINARIAN: Killing of diseased animals. See STATE VETERINARIAN.

VILLAGES. See MUNICIPAL CORPORATIONS, 12, 13.

VOLUNTARY ASSIGNMENT.

See ATTACHMENT, 1.

1. An assignment for the benefit of creditors is alleged with sufficient particularity to allow proof of the fact when it is averred that the assignment was made; that it was in due form of law; that all conditions required by statute to give it full effect and validity have been performed; and that the assignee has entered upon the discharge of his duties thereunder. *Rollins v. Humphrey*, 66

2. The bond of an assignee for the benefit of creditors, executed by the principal and ninety-five sureties, had been approved by the county judge who took it, and he had certified that the property of the sureties therein named was worth the sum specified. The signature of one of the sureties and his name in the body of the bond had been erased, but it was not shown when the erasure was made. *Held*, that the erasure was not such a suspicious circumstance as to call for explanation before the bond could be admitted in evidence in garnishment proceedings against the assignee. *Ibid.*

3. Two or more persons may adopt a single seal. A voluntary assignment, therefore, is not necessarily rendered void as to attacking creditors by the fact that there was but one seal or scroll on the assignee's bond, and that opposite the signature of the assignee. *Ibid.*

4. Where a member of a copartnership has made a voluntary assignment of his individual property, creditors of the partnership are not entitled to have their claims paid out of the estate in the hands of the assignee, so long as any of the individual creditors remain unpaid in whole or in part. *Thayer v. Humphrey*, 91 Wis. 276, followed. *Ibid.*

5. An insolvent debtor made a voluntary assignment which was void because of the failure of the assignee to sign the bond. Plaintiffs filed their claim with the assignee without knowing of the defect or making any effort to ascertain their rights. Afterwards a large number of other creditors also filed their claims. Subsequently plaintiffs commenced garnishment proceedings against the assignee, but before the trial thereof the assignee was allowed to sign the bond *nunc pro tunc*. *Held* that, by becoming parties to

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the assignment proceedings and remaining such for a considerable length of time, the plaintiffs were estopped from maintaining the garnishment action. *Keith v. Arthur*, 189

6. Failure of the court commissioner who approved the bond of an assignee for the benefit of creditors to sign the certificate required by sec. 1696, R. S., to be indorsed on the copy of the assignment deposited in the office of the clerk of the circuit court, renders the assignment void as to attacking creditors, even though the omission was inadvertent. *Jones v. Alford*, 245

7. Where a voluntary assignment was void as to attacking creditors because of a failure to comply with a statutory requisite, rights of creditors which had become fixed by judgment in garnishment proceedings against the assignee were not affected by the subsequent passage of a curative act (sec. 2, ch. 334, Laws of 1897). *Ibid.*

8. Prior to the making of a voluntary assignment, void as to attacking creditors, property of the assignor had been levied upon under executions. Before the property was sold garnishment proceedings were commenced against the assignee. *Held*, that the assignor's interest in the surplus arising from the sale of such property was subject to garnishment under sec. 2786, R. S., and that the assignee was chargeable on account thereof. *Ibid.*

9. Under sec. 1693*a*, S. & B. Ann. Stats. (providing that all assignments for the benefit of creditors which give preferences, except for wages of laborers, servants, and employees, earned within six months prior thereto, shall be void), a manifest purpose on the part of an assignor, in giving preferences to his daughter and minor son, to bestow upon them a bounty in excess of the wages earned by them within six months prior to the assignment, or at all, renders the assignment void. *Gordon v. Harley*, 458

VOLUNTARY PAYMENT. See VENDOR AND PURCHASER, 7.

WAGES: Recovery *quantum meruit*. See MASTER AND SERVANT, 1, 2.

WAIVER.
Of objections. See APPEAL, 12. CRIMINAL LAW, 2. LOGS AND LUMBER, 3.
Of right to have action dismissed. See APPEAL, 19.
Of right to question validity of law. See CORPORATIONS, 1 (5).
Of right to remedy. See GARNISHMENT. RAILROADS, 3.
Of forfeitures. See INSURANCE, 5, 6. LANDLORD AND TENANT, 1.
Of condition in policy. See INSURANCE, 8, 9.
Of exemption from action. See MUNICIPAL CORPORATIONS, 6.

WARRANT. See CRIMINAL LAW, 4.

WATERS.

The owner of land on which surface water accumulates has no right to conduct the water by an artificial channel to a point on his own land in close proximity to the line, where it will inevitably permeate the surrounding soil and percolate through the same into his neighbor's land, to the permanent injury of the latter. *Schuster v. Albrecht*, 241

WILLS.

See ESTATES OF DECEDENTS, 5.

1. A will made *in extremis* bequeathed to the testator's wife "two thirds of my estate while she remains my widow (if not) one half to go to her heir, and the other third to my brother D." The tes-

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tator had no living children, but knew that his wife was pregnant. *Held*, that the testator intended to give his wife two thirds of his entire estate if she remained his widow, but if she remarried one of said thirds was to go to her unborn child. *Verrinder v. Winter*, 287

2. A devise or bequest of such a contingent remainder to the unborn child either constituted a provision, or showed that the testator intended to make no provision, for him, within the meaning of sec. 2286, R. S. 1878, providing, in substance, that such a child shall abide by the will in case provision is made for him or the will shows an intention to make no provision, but that in default of either the child shall inherit as though the ancestor died intestate. *Ibid.*

3. Unless notice of the time and place of proving a will was given as required by sec. 3787, R. S. 1878, all subsequent proceedings based thereon are void as to such persons in interest as did not appear or assent thereto, or have not since supplied such want of appearance by acts clearly indicating an assent thereto or ratification thereof. *Heminway v. Reynolds*, 501

4. Testimony of the attorney for the proponent of a will that he was present when the will was admitted to probate, and remembered getting money from his client which he paid to the printer of a newspaper for printing notice of the proof of the will, and that an affidavit of the publication of such notice was made and filed by him with the county judge, but that he did not pretend to remember its contents; and testimony of the proponent that she gave such attorney money to pay the printer's fees, and thought she remembered seeing the notice in the papers, but did not know what kind of a notice it was that she saw, are *held* sufficient to sustain a finding that a notice was published, but entirely insufficient to sustain a finding that a proper and legal notice was given. *Ibid.*

5. A decree, entered July 3, admitting a will to probate, recited substantially that notice had been given as required by an order of June 6. That order fixed the date of hearing as Saturday, July 3, and directed publication of notice "according to law." Saturday was in fact July 4 and a legal holiday upon which the court could do no work. The form of notice prescribed by statute is: "Notice is hereby given that at the ——— term of the county court to be held . . . on the first Tuesday of ———, A. D. 18—, the following matter will be heard and considered," etc., no day of the month being mentioned. *Held*, that the inference would arise that the notice as published fixed the day of hearing either on the first Saturday of July, or, as mentioned in the order, "on Saturday the 3d day of July." In the first event the notice would be illegal, and in the second misleading and deceptive and therefore insufficient. *Ibid.*

6. By his will a testator, who left a very small amount of property and a very large family, gave all his property to his wife, to be used and held by her for her own support and the support and education of their minor children until they should become of age, and until she should die or remarry, the balance of said estate at her death or remarriage to be divided among the children. The will stated that it was expressly intended that the wife should have the full right and power to hold the property and the testator's business, and carry on the same, in the same manner as he could do were he living, and that she should have the right to sell and dispose of any and all of the property as she might deem best for the use and purposes aforesaid. *Held*, that the will gave her

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power to mortgage the property as well as to sell and convey it. [Whether a simple power of sale will authorize a mortgage, not determined.] *Lardner v. Williams*, 514

WITNESSES. See CRIMINAL LAW, 8. EVIDENCE, 2. NEW TRIAL, 4.

WORDS AND PHRASES.
Adverse party, in statute. See APPEAL, 7.
Assignment, in statute. See LIENS, 11.
Bounded by street or river, in deed. See PLATS OF LAND, 1.
Claim against the state, in statute. See CLAIMS, 1.
Coal for fuel, with sufficient wood to kindle, etc., in policy. See INSURANCE, 14–16.
Conflict of evidence. See COURT AND JURY, 2.
Conveyance, in statute. See RECORDING ACTS.
Filed with city clerk, in statute. See MUNICIPAL CORPORATIONS, 8.
Incompetence of servant. See MASTER AND SERVANT, 20 (3), 24.
Indebtedness, in constitution. See MUNICIPAL CORPORATIONS, 3.
Injury to the inheritance, in statute. See RAILROADS, 1.
May, in city charter. See MUNICIPAL CORPORATIONS, 8.
Presented for allowance, in statute. See MUNICIPAL CORPORATIONS, 8.
Proceeds of sale, in statute. See HOMESTEADS, 1.
Provision for unborn child, in statute. See WILLS, 2.
Purchaser, in statute. See RECORDING ACTS.
Privilege of a *renewal*, in lease. See LANDLORD AND TENANT, 2–4.
Riot, in statute. See RIOT.
Special law to amend charter, in constitution. See MUNICIPAL CORPORATIONS, 5.
Unlawful assembly, in statute. See RIOT.
Wholly destroyed, in statute. See INSURANCE, 10–12.

WRIT.
Of attachment. See ATTACHMENT.
Of error. See CRIMINAL LAW, 1–3.
Of execution. See CLOUD ON TITLE, 2. HOMESTEADS. PARTNERSHIP. RECEIVERS.
Of injunction. See CONTEMPT. COURTS. INJUNCTIONS. INSURANCE, 1, 2.
Of *mandamus*. See MUNICIPAL CORPORATIONS, 7.

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